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No. _____

In The

Supreme Court of the United States

TOM DORAN and MELBA GONZALES,

Petitioners,

vs.

CHARLES C. CURRIER, as personal representative Of the Estate of Anthony Michael Juarez, deceased; and DEVONNE ESPERANZA JUAREZ, as mother and next friend of Latasha Juarez, a minor,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Tenth Circuit erred in refusing to grant social workers absolute immunity for recommendation to the court and other actions integral to the judicial process.

Whether the Tenth Circuit erroneously held that the allegation that social workers caused the court to award legal custody of children already in natural father's physical custody to natural father establishes a substantive due process violation under danger creation theory.

Whether the Tenth Circuit erroneously denied qualified immunity to social workers by refusing to determine an issue of law critical to the qualified immunity defense.

Whether the Tenth Circuit erroneously denied qualified immunity to social workers by concluding that in 1993 a reasonable social worker would have known that he was violating the law by inadequately investigating the mother's allegations of abuse when father had physical custody.

LIST OF PARTIES

Tom Doran, Petitioner

Melba Gonzales, Petitioner

Charles Currier, personal representative of the estate of Anthony Michael Juarez, Respondent

Devonne Esperanza Juarez, as mother and next friend of Latasha Juarez, a minor, Respondent

Shirley Medina, Regina Sentell and Kelly Robbins have been dismissed and are no longer interested parties unless Plaintiffs file cross-petition challenging their dismissals.

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PETITION FOR A WRIT OF CERTIORARI

Tom Doran and Melba Gonzales respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported as *Currier v. Doran*, 242 F.3d 905 (10th Cir. 2001). App. 1-43. The district court's second opinion is unreported. App. 44-56. The district court's first opinion is reported at 23 F.Supp. 2d 1277 (D. N.M. 1998). App. 57-71, vacated in part, App. 72-74.

JURISDICTION

The judgment of the Tenth Circuit Court of Appeals was entered on March 1, 2001. The Court of Appeals denied a timely petition for rehearing on June 1, 2001. App. 80-81.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 13.3 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISION AT ISSUE

Fourteenth Amendment to the United States Constitution, Section I.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life,

liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondents, the personal representative and guardian for minor children Anthony and Latasha Juarez, sued social workers for the State of New Mexico for violation of substantive due process rights under 42 U.S.C. § 1983. They alleged that various social workers were liable under substantive due process for injuries they received while in the legal and physical custody of their natural father. Defendants moved for qualified immunity. The district court held that even though the children were in their father's custody at the time of injury, respondents' complaint stated a claim under danger creation because the children were removed from their mother's home and legal custody granted to their father on the recommendation of the social worker. The court of appeals denied immunity to social worker Tom Doran and his supervisor, Melba Gonzales, but reversed as to other social workers.

A. Facts Giving Rise To This Case.

On April 30, 1993, social worker Shirley Medina investigated a child neglect referral. Medina found several children, all under four years of age, in the care of a five-year-old. Three children, Latasha, Anthony and Jacob, were the children of Devonne Juarez, who had left the state.

Christopher Vargas was the father of Anthony and Latasha. Jacob had a different father. The fathers had not been living with Devonne Juarez or the children. Medina

delivered the children to the physical custody of the Children, Youth and Families Department of the State of New Mexico (hereinafter "CYFD").

On May 10, 1993, the children's court held a custody hearing. Prior to the hearing, social worker Tom Doran learned that Christopher Vargas had made only eight child support payments in the preceding three years and worked at a local Denny's restaurant. Doran appeared at the custody hearing, but said nothing about Vargas' history of child-support payments.

Based on the recommendation of social worker Medina, the court granted physical custody of Anthony and Latasha to their father, Christopher Vargas, while keeping legal custody with CYFD. CYFD retained both legal and physical custody of Jacob. One month later, on June 23, 1993, the children's court entered an order which stated: "It is in the best interest of the child(ren) that Christopher Vargas be named as an interested party and physical and legal custody of Latasha and Anthony be returned to Christopher Vargas." App. 92.

CYFD continued with the abuse and neglect action against Devonne Juarez and facilitated the visitation of Jacob, of whom they had custody, with Latasha and Anthony and with the Juarez family.

Devonne Juarez returned to New Mexico in August 1993 and twice asserted to the children's guardian ad litem that Vargas and his fiancé were physically abusing Latasha and Anthony. During the course of a comprehensive psychological evaluation in August, Juarez made a similar allegation. Plaintiffs allege that Doran learned of at least one of the allegations to the guardian ad litem and the allegation to the psychologist, but failed to investigate.

In an affidavit submitted in support of a motion for summary judgment, social worker Doran described his encounters with the children, including his observation of bruises which he did not consider abusive. Although the district court and the Tenth Circuit treated the motion for summary judgment as a motion to dismiss, both courts relied upon Doran's observation of bruises as described in his affidavit, but not alleged in the complaint. Both courts ignored Doran's judgment that the incidents were not indicative of abuse. These incidents included: On July 22, 1993, while at Vargas' home, Doran noticed a small bruise on Anthony's cheek and spoke to Vargas' girlfriend about its origin. She claimed the bruise was the result of a fall on the playground. Doran, in his affidavit, stated that the bruise did not appear to be the result of abuse and the explanation for it seemed correct. He concluded that there was no cause to believe Anthony had been abused, and neither Anthony nor Latasha were in custody. On August 3, 1993, Anthony had another single bruise when he was brought to the CYFD office for a visit with Devonne's family and Jacob. Latasha told Doran that the bruise was caused by a fall. Doran concluded that the bruise was likely caused by a fall and was not serious enough to indicate abuse.

Doran's affidavit also described an incident on October 15, 1993. During a visit between Juarez and the children at the CYFD office, Doran left to answer a phone call. When he returned, a relative of Devonne Juarez pointed to two small bruises on Latasha's back and said to Latasha, "Who did that to you?" Latasha replied "Da Da". However, when interviewed by Doran outside the presence of the Juarez family, Latasha denied her father caused the marks. Anthony was checked and he had no

marks. Doran followed up by interviewing Mr. Vargas and his girlfriend, and they explained that the bruises had been caused by a bunk bed ladder, which they had since thrown away. Latasha was interviewed a second time and again said she did not know how she got the marks. Doran concluded that there was not sufficient evidence of abuse and that the bruises could have occurred from play.

Although the June 23, 1993 order stated that Vargas had legal and physical custody and was an interested party (not a respondent), an order entered July 14, 1993 inconsistently stated that "Latasha and Anthony remain in the legal custody of CYFD". App. 94. An order entered on October 19, 1993 stated, "Mr. Vargas continue [sic] as interested [party] has legal, physical custody of Anthony and Latasha . . . ". App. 99. On November 10, 1993, the court entered a stipulated judgment and disposition, stating: "legal custody of Latasha and Anthony Juarez has been granted to Christopher Vargas by the Court on June 21, 1993." App. 87. Notwithstanding the court order clarifying when legal custody was awarded to Christopher Vargas, plaintiffs' complaint alleged legal custody was not awarded until October 1993.

In April 1994, ten months after the June 1993 order and six months after the October order, Vargas poured boiling water on Anthony, causing severe burns. Anthony died on May 3, 1994.

B. The Initial Proceedings.

Plaintiffs filed a Section 1983 complaint against Tom Doran, social worker, and Melba Gonzales, supervisor, alleging substantive due process violations arising out of Anthony Juarez' death at the hands of his natural father.

Other social workers were named but have been dismissed.

Petitioners raised a qualified immunity defense and asserted that *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989), precluded plaintiffs' claim since Anthony was in his father's legal and physical custody at the time of his injury. The court entered a scheduling order allowing for discovery on "the preliminary issue of the legal custody and exercise of control over Anthony Juarez and Latasha Juarez." App. 76. After the end of the discovery period, all defendants moved for summary judgment, relying on the court order entered June 23, 1993, returning legal custody to the father on June 21, 1993, physical custody having been returned on May 10, 1993.

The district court held that because the children were not living with their father prior to the state removal, defendants created danger and had responsibility for the children's subsequent safety as a result of their alleged involvement with, or recommendation to, the children's court concerning custody. App. 65-66. The district court treated the motions for summary judgment as motions to dismiss and did not resolve whether legal custody was awarded to the father in June or October 1993, because it considered defendants' actions both before and after the return of legal custody relevant to the determination of whether plaintiffs stated a claim for danger creation. *Id.* After the court ruled that plaintiffs' complaint stated a claim for substantive due process, defendants moved for qualified immunity. The district court denied defendants Doran, Medina and Gonzales qualified immunity, finding the law was clearly established. App. 50. The district court considered the bruising that Doran observed, as discussed in his affidavit, but not his description of his

investigation or other facts offered by defendants in that affidavit. App. 51.

C. The Appeal.

The Tenth Circuit decided that because the children were not returned to Devonne Juarez but to their natural father, Defendants could be held liable for creating danger. The Tenth Circuit held that only facts occurring before the father obtained legal, not physical, custody were relevant to danger creation. App. 29. However, even though discovery had been allowed on the custody issue, the Tenth Circuit did not disturb the district court's decision to treat the motion for summary judgment as a motion to dismiss and not to enter a finding on the date the father obtained legal custody. App. 28-9 n.6. Accordingly, the Tenth Circuit accepted plaintiffs' allegation that legal custody was not granted to Vargas until October 1993 and considered, for purposes of danger creation, allegations concerning conduct after the June 23 court order purportedly returning legal and physical custody to the father. *Id.*

The Tenth Circuit held that the allegation that Doran caused the children's court to award the father legal custody through his inadequate investigation of bruises and the mother's allegations and the failure to report these to the court, or through his affirmative recommendation to the court, could meet the Tenth Circuit's standard for a substantive due process violation under the danger creation theory. App. 29-30. The Tenth Circuit held that the law was clearly established and denied Doran and Gonzales, his supervisor, qualified immunity. App. 40-43.

Both petitioners and respondents sought rehearing or rehearing *en banc*. Rehearing was denied on June 1, 2001.

REASONS FOR GRANTING THE WRIT

I. The Petition Should be Granted because the Tenth Circuit's Denial of Absolute Immunity to a Social Worker for his Recommendation to Children's Court Conflicts with this Court's Decision in *Imbler* and with the Decisions of Several Circuit Courts.

The Tenth Circuit's decision recognizing a claim against a social worker for a recommendation to a court conflicts with decisions of this court and other circuits.

Social workers are entitled to immunity for recommendations to the court and decisions concerning prosecution of a case because, under the functional immunity analysis, their actions in preparing for, initiating and prosecuting neglect proceedings are similar to the actions of a prosecutor. *See, Imbler v. Pachtman*, 424 U.S. 409 (1976) (recognizing prosecutorial immunity) and *Burns v. Reed*, 500 U.S. 478 (1991) (extending prosecutorial immunity to actions connected with the initiation and conduct of a prosecution). The Third, Fourth, Sixth, Seventh, Eighth and Ninth Circuits have all held that social workers are entitled to absolute immunity in this role.[1] Doran's

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[1] *Ernst v. Child & Youth Servs.*, 108 F.3d 486, 497 (3rd Cir. 1997), *cert. denied*, 522 U.S. 850 (1997) (social workers have absolute immunity under functional analysis for formulation and presentation of recommendations to the Court); *Vosburg v. Dept. of Social Services*, 884 F.2d 133, 135 (4th Cir. 1989) (social workers entitled to absolute immunity for functions integral to judicial process including initiation and presentation of case); *Salyer v. Patrick*, 874 F.2d 374, 378 (6th Cir. 1989) (social workers

alleged responsibility for the court order granting legal custody to the father is clearly analogous to the function performed by prosecutors. *Meyers v. Contra Costa Dept. of Social Services*, 812 F.2d 1154, 1157 (9th Cir. 1987), *cert. denied*, 484 U.S. 829 (1987) (although social workers do not initiate proceedings, their responsibility is not very different from the responsibility of a criminal prosecutor).

The actions upon which liability was premised in this case were failing to investigate the mother's allegations of abuse, failing to further investigate bruising when the children were in the father's physical custody[2] and recommending that the father assume legal custody. App. at 31. Six other circuits accord the social worker absolute immunity for recommendations to the court or for decisions on how to proceed with the judicial process. In

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entitled to absolute immunity for filing abuse petition); *Millspaugh v. County Dept. of Pub. Welfare of Wabash County*, 937 F.2d 1172, 1176 (7th Cir. 1991), *cert. denied*, 502 U.S. 1004 (1991) (presentation of case to court is analogous to prosecutorial function entitling social worker to absolute immunity); *Meyers v. Contra Costa County Dept. of Social Services*, 812 F.2d 1154, 1156 (9th Cir. 1987), *cert. denied*, 484 U.S. 829 (1987) (social workers absolutely immune for decision concerning bringing a proceeding). *See also Pepper v. Alexander*, 599 F.Supp. 523, 526 (D. N.M. 1984) (social worker absolutely immune for decision to apply for termination of parental rights and for participation in that proceeding).

[2] The alleged failure by Doran to investigate the mother's allegations when the father had physical custody is not actionable as danger creation because the alleged omissions could not, by definition, create the danger. That claim is merely a failure to protect claim under a different name. The children were already in the father's custody. The failure to investigate could not, therefore, *create* danger. *See* § II, *infra*.

recommending action by the court, the social worker acts as an advocate for the state and has absolute immunity. *See Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) (prosecutor has absolute immunity in role as advocate).

While a social worker may not have absolute immunity if he violates a person's civil rights while conducting an investigation, that exception for the investigatory function does not defeat a social worker's immunity in making a recommendation to the court. Compare *Snell v. Tunnell*, 920 F.2d 673, 687-691 (10th Cir. 1990), *cert. denied*, 499 U.S. 976 (1991) (social workers have absolute immunity for tasks integral to judicial process, not for investigative tasks not integral to judicial process) with *Ernst v. Child & Youth Servs.*, 108 F.3d 486, 497 (3rd Cir. 1997), *cert. denied*, 522 U.S. 850 (1997) (absolute immunity for formulation of recommendation to court). It is important to determine the precise claim upon which liability is based in order to apply immunity. *Burns v. Reed*, 500 U.S. 478, 487 (1991). When Doran considered whatever evidence he had and made a recommendation to the court, he was acting as an advocate and entitled to absolute immunity.

The Tenth Circuit's opinion that Doran's recommendation to the court that legal custody be granted to the natural father states a claim for a substantive due process violation is contrary to the holdings in five circuits. This court should accept certiorari to resolve whether social workers are immune for their role in advising courts or in prosecuting or dismissing cases. *See Hoffman v. Harris*, 511 U.S. 1060 (1994) (Thomas, J. dissenting in the denial of certiorari; Supreme Court should address question of whether social workers are entitled to absolute immunity).

Certiorari should be granted because social workers need to know that they can give candid advice to the court without subjecting themselves to liability or second-guessing based on hindsight. The functional approach to immunity will be meaningless if plaintiffs, as here, can defeat immunity for making recommendations to the court in an abuse and neglect case by asserting that the advice might have been different had the social worker done something different before giving the advice. The exception would become the rule. Guidance from the court will resolve the apparent conflict between the Tenth Circuit and other circuits and enable social workers to know that, when advising the court, they are immune.

II. The Petition Should be Granted Because the Tenth Circuit's Recognition of a Substantive Due Process Violation for Causing Court to Award Legal Custody to Natural Father of Children Already in Father's Physical Custody Conflicts with Decisions of This Court and Other Circuits and is an Important Question of Federal Law.

This case came before the court on a motion for qualified immunity. The first step of the qualified immunity analysis is to determine if plaintiffs have alleged the violation of a constitutional right. *Siegert v. Gilley*, 500 U.S. 226 (1991). The Tenth Circuit held that the allegation that a social worker was responsible for a court awarding legal custody to a biological parent who already had been awarded physical custody states a claim for violation of substantive due process under danger creation. App. at 31.

In *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989), the Supreme Court held that the

return of a child in temporary custody to an abusive father did not state a substantive due process claim. The Tenth Circuit distinguished *DeShaney* because the children herein were not living with the father when the state first intervened. By the time Doran allegedly created the danger, however, the children had been living with the father for five months. This extension of the danger creation theory raises several important issues on which there is divergent authority among the circuits. These issues are: 1) to what extent must a state actor's conduct increase the danger of private violence in order to support a claim for violation of substantive due process rights; 2) must the state actor's conduct be active, as opposed to passive, in order for danger creation to apply; 3) how close in time must the injury be to the conduct of the state actor to support a claim that the state actor created the danger and violated the plaintiff's substantive due process rights; and 4) does a recommendation that the father be granted legal custody demonstrate the level of abuse of power necessary to state a substantive due process violation? A decision from this court is necessary to resolve the conflict among the circuits on these issues and to give guidance to social workers.

Several circuits have used the danger creation doctrine as a basis for claims of violation of substantive due process rights.[3]

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[3] *See, e.g., Reed v. Gardner*, 986 F.2d 1122 (7th Cir. 1993), *cert. denied*, 510 U.S. 947 (1993) (police may have created dangerous condition when they arrested sober driver and left drunk passenger in car with the keys); *Gregory v. City of Rogers*, 974 F.2d 1006 (8th Cir. 1992), *cert. denied*, 507 U.S. 913 (1993); *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992), *cert. denied*, 508 U.S. 951 (1993) (prison officials potentially liable under danger creation

The genesis of this doctrine is related to the following language of this court in *DeShaney*:

> While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter. Under these circumstances, the state had no constitutional duty to protect Joshua. *DeShaney*, 489 U.S. at 201.

Although there is apparent agreement among the circuits that danger creation is a valid theory upon which to base a substantive due process claim, there is no uniformity regarding the degree to which, or manner in which, the state actor must be involved in creating the danger for liability to exist, nor is there agreement as to

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theory for intentionally placing female nurse in position of known danger with dangerous felon); *Freeman v. Ferguson*, 911 F.2d 52 (8th Cir. 1990) (there is potential for danger creation liability where police refused to take seriously allegations by wife regarding threats by estranged husband); *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995), *cert. denied*, 516 U.S. 1118 (1996) (establishing elements for danger creation claim); *Tazioly v. City of Philadelphia* (unpublished), No. CIV A 97-CV-1219, 1998 WL 633747 (E.D. Pa. Sept. 4, 1998); *Armijo v. Town of Wagon Mound*, 159 F.3d 1253 (10th Cir. 1998) (school employees held liable for danger creation when they left a distraught, suicidal student at home, unsupervised, knowing there were weapons in the home).

how immediate the danger must be in order for the doctrine to apply.

A. Review is warranted because the Tenth Circuit's decision conflicts with *DeShaney*'s holding that failure to protect a child from a parent does not violate substantive due process.

The Tenth Circuit held that *DeShaney* did not bar liability because in *DeShaney* the child was in his father's custody before state intervention and then returned to his father's custody, while in this case the children moved from their mother's to their father's custody. App. 25.[4] The Tenth Circuit stated "Anthony and Latasha would not have been exposed to the dangers from their father but for the affirmative acts of the state; the same cannot be said for Joshua in *DeShaney*." *Id.* The "but for" rationale should not substitute for causation, nor is it a sufficient constitutional basis to disregard *DeShaney*. This is not a case against the state, but against individuals. Neither Doran nor Gonzales removed the children, nor were they responsible for the original placement with the father. The Tenth Circuit held "[b]ased on the recommendation of Medina, the court granted physical custody of the children to Vargas while keeping legal custody with CYF." App. 5. Thus, for defendants Doran and Gonzales the case is indistinguishable from *DeShaney*. When they acted, the children were legally with the father. Neither

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[4] Since Devonne Juarez had left the state and had left the children with her father, who in turn left them with a five-year-old cousin, the use of the term "custody" with reference to the natural mother is misleading. The children were not living with either parent and were being neglected by the relative in whose care the mother left them. App. 4.

Doran nor Gonzales created or increased the danger to the children. If anything, they, like the social workers in *DeShaney,* allegedly had knowledge of the children's predicament and failed to protect them. *See DeShaney,* 489 U.S. at 200.

Since the father had been awarded physical custody in May 1993, Doran's recommendation that the father be granted legal custody did not *create* danger. *See DeShaney,* 489 U.S. at 201 (awareness of danger to child is insufficient to state substantive due process claim). Granting Vargas legal custody did not effect any substantive change in the status of the children because he had physical custody. That situation is indistinguishable from *DeShaney.*

The Tenth Circuit's holding causes several problems for social workers who are required to place or recommend placement of children with their families. Under New Mexico law, "parents have a natural and legal right to custody of their children." *State v. Sanders,* 96 N.M. 138, 628 P.2d 1134 (Ct.App. 1981). That right to custody exists unless terminated by appropriate authority. *Id.* For example, the father could have picked up the children from the home where Devonne left them without any court or state action. *Id.* Social workers must balance the legal rights of less than perfect parents against the state's interest. *In The Matter of Steven,* 128 N.M. 304, 307, 992 P.2d 317, 320, 1999 NMCA 141 (N.M. 1999). *See also* § 32-1-54(B) NMSA 1978 (1989 Rep.Pam.) requiring social workers to try to reunify families. *Kramer v. New Mexico Human Services Dept.,* 114 N.M. 479, 484, 840 P.2d 1245 (Ct.App. 1992) (Federal Adoption Assistance and Child Welfare Act requires child welfare agencies to make reasonable efforts to maintain children with their families). Defendants Doran and

Gonzales could not keep the children from living with their father unless to do so was demonstrably inimical to their welfare. *Miller v. Youakim*, 440 U.S. 125, 139 (1979). Therefore, once the children were properly removed from the neglectful home where their mother had left them, the father had a legal and constitutional right to custody and the social worker had a duty to try to reunify the children with their father. At the time of the award of physical custody, there is no allegation that Vargas had abused or endangered the children. The only allegation is that he had been delinquent in child support.

The Tenth Circuit's holding imposes a continuing duty to protect, contrary to *DeShaney*, on every successive social worker involved with a family when an earlier social worker was involved in some way in a change in custody between parents. The Tenth Circuit's decision splits the danger creation claim to impose danger creation liability on defendants who did not expose plaintiff to injury. This eviscerates *DeShaney's* holding that there is no duty to protect a person from a third party. Review is warranted to clarify the duties of social workers.

B. Review is warranted because the Tenth Circuit's recognition of a substantive due process violation for passive conduct that does not abuse the official's power conflicts with the holdings of this Court.

The Tenth Circuit's decision in *Currier* to recognize a substantive due process claim under danger creation for passive conduct represents a significant departure from previous law. The Court of Appeals held that the following allegations regarding Doran were sufficient to state a claim under the danger creation theory: that he was

"responsible" for the Children's Court's decision to grant Vargas legal custody on October 19, 1993, through his failure to investigate bruises and mother's allegations of abuse and report to the Court or through his affirmative recommendation. App. 31. Plaintiffs alleged Gonzales was independently liable for inadequately training or supervising Doran in relation to these activities.

That the state actor must truly create a danger, as opposed to fail to protect a child, was decided by this court in *DeShaney*. "The Due Process Clause of the Fourteenth Amendment was intended to prevent government from abusing [its] power, or employing it as an instrument of oppression." *DeShaney*, 489 U.S. at 196, quoting *Davidson v. Cannon*, 474 U.S. 344 (1986). The due process clause is a limitation on the state's power to act and does not impose an affirmative duty. *Id.* "Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty or property." *Collins v. City of Harker Heights*, 503 U.S. 115, 126 n.10 (1992) (emphasis in original).

The Tenth Circuit's analysis recognizes a new substantive due process claim without the *Collins* requirement of deliberate action. In addition, although the Tenth Circuit uses a "shock the conscience" standard, the conduct referenced (a recommendation that a natural father be granted legal custody despite the mother's abuse allegations) does not equate with this court's threshold for conduct which shocks the conscience. *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998) (conduct intended to injure and which is not justifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level). Given the social worker's duty to balance a parent's interest in custody against the

state's interest in safety and in reunifying families, the social worker's conduct herein is certainly justifiable. In *County of Sacramento*, the court emphasized that to be actionable, official conduct must demonstrate a "level of abuse of power" or activity that was "so 'brutal' and offensive that it did not comport with traditional ideas of fair play and decency." 523 U.S. at 846-847, quoting *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957), itself quoting *Rochin v. California*, 342 U.S. 165 (1952). While the ultimate injury to Anthony Juarez was egregious, the alleged conduct of defendants, that is, recommending a child remain in the father's home despite some uninvestigated allegations by the mother, does not meet the level of abuse of power that this court's cases require for a substantive due process claim.

The circuit courts have utilized varying standards for determining if a state actor has engaged in conduct which creates danger. The Eighth Circuit, in *Freeman v. Ferguson*, 911 F.2d 52 (8th Cir. 1990), stated "the law is not entirely established" as to the extent which the government must increase the danger of private violence for danger creation to apply. 911 F.2d at 55. In *McComb v. Wambaugh*, 934 F.2d 474, 482 (3rd Cir. 1991), the Third Circuit stated there must be evidence of "active" conduct by the state actor in creating the danger and mere lack of diligence in performing job duties is not sufficient. In *Reed v. Gardner*, 986 F.2d 1122 (7th Cir. 1993), *cert. denied*, 510 U.S. 947 (1993), the Seventh Circuit stated that an allegation that the state actor "created or substantially contributed" to creation of a danger would support a claim for danger creation. 986 F.2d at 1126. In *Bank of Illinois v. Over*, 65 F.3d 76, 78 (7th Cir. 1995), the same circuit held there must be evidence that the state actor was "complicit" in

the violence in order to state a claim arising out of injury caused by a third party.

The Tenth Circuit, prior to this case, held that the "[t]he key to state-created danger cases . . . lies in the state actors' culpable knowledge and conduct in *affirmatively* placing an individual in a position of danger . . . " *Armijo v. Town of Wagon Mound*, 159 F.3d 1253, 1263 (10th Cir. 1998), quoting *Johnson v. Dallas Ind. Sch. Dist.*, 38 F.3d 198, 201 (5th Cir. 1994) (emphasis added). Prior to *Currier*, the Tenth Circuit had exercised restraint in expanding the danger creation doctrine, limiting danger creation to situations where there was affirmative conduct by the state actor which proximately caused the plaintiff's injury. *Compare Armijo* with *Liebson v. New Mexico Corrections Dept.*, 73 F.3d 274 (10th Cir. 1996), and *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995). In this case, there was no danger when the children were put in their father's physical custody. At that time, the only allegation was that the father had not paid all child support.

The *Currier* decision also conflicts with authority from other circuits involving similar facts and holding that danger is not created when a child in the physical custody of a parent or relative is injured by that person, even if the state has legal custody. In *Powell v. Georgia Department of Human Resources*, 114 F.3d 1074 (11th Cir. 1997), the Eleventh Circuit affirmed the lower court's dismissal of a claim against a social worker arising from the death of a child who was in state legal custody. The social worker gave physical custody of the child to his grandmother with instructions not to leave the child with his mother because of prior abuse. The social worker learned that contrary to these instructions, the grandmother was allowing the child to live with his mother,

but did nothing about it. *Id.* at 1066. Nineteen days later, the child died of head injuries at his mother's home. *Id.* The Eleventh Circuit found the social worker's conduct "indistinguishable" from the conduct of the social workers in *DeShaney*. 114 F.3d at 1079. The court rejected the argument that the social worker violated the child's due process rights by releasing him to his grandmother, a family member who had not previously been granted custody of the child and who allowed the mother to care for the child. *Id.*

In *Wooten v. Campbell*, 49 F.3d 696, 698 (11th Cir. 1995), *cert. denied*, 516 U.S. 943 (1995), the Eleventh Circuit affirmed dismissal of a claim arising from the death of a child over whom the state had legal custody but who was living with his mother. Despite knowledge of danger because of a prior kidnapping of the child by the father, the agency consented to the resumption of unsupervised visits between the father and the child. *Id.* On one of these visits, the father again kidnapped the child and killed him. *Id.* The Eleventh Circuit determined that, based on *DeShaney* there was no substantive due process violation in allowing unsupervised visits with the father, despite the father's prior kidnapping. The court stated, "Under these circumstances, allowing a child visitation with a natural parent does not so 'shock the conscience' as to constitute a substantive due process violation." *Id.*, at 700, citing *DeShaney*, 489 U.S. at 197. The court stressed that the "purpose of the Due Process Clause is to protect the people from the state, not to ensure that the state protects people from each other." *Id.*, citing *DeShaney*, at 196.

Wooten, Powell and the instant case demonstrate a split among the circuits in the application of the danger

creation theory. This conflict involves a core element of the doctrine: What type of conduct gives rise to danger creation? The conflict among the circuits, together with the lack of certainty as to the application of the standard previously articulated by the Tenth Circuit, causes uncertainty in the standards of conduct for state officials and this uncertainty is detrimental to both officials and individuals. Absent a ruling from this Court on this core issue, the circuits will continue to apply this doctrine inconsistently.

Since this court's decision in *DeShaney*, the lower courts have attempted to define if and when government actors can be held liable under the Fourteenth Amendment for creating danger. This court's decisions in *DeShaney*, *County of Sacramento v. Lewis* and *Collins v. City of Harker Heights* impose liability for deliberate decisions and abuse of power, not for omissions or failure to protect, as were involved in *DeShaney*. The Tenth Circuit's endorsement of a substantive due process claim for passive conduct blurs the line between deliberate action to create danger, which is actionable, and mere failure to protect, which *DeShaney* ruled did not support a claim for violation of substantive due process rights. Review will avoid further blurring of the line and re-establish the limits on substantive due process established by this court in *DeShaney* and *County of Sacramento*.

C. The Tenth Circuit's decision conflicts with other Circuits and prior Tenth Circuit authority that the danger must be immediate for danger creation to apply.

The injuries to Anthony and Latasha occurred ten or six months after Vargas was granted legal custody,

depending on whether legal custody was granted in June or October, and almost a year after he was granted physical custody. Prior Tenth Circuit authority on danger creation required that the state actor's conduct put the victim at substantial risk of serious, immediate and proximate harm. *Armijo, supra,* 159 F.3d at 1262. In *Armijo,* the injury occurred within hours of the time school officials left the student at his home alone. Decisions from other circuits similarly hold that the injury must be in close temporal proximity to justify application of the danger creation theory. *See, e.g., Reed v. Gardner, supra,* where court held danger creation applicable where accident was caused by drunk driver who, shortly before the accident, had been allowed to remain in a car with the keys following the arrest of the sober driver; *L.W. v. Grubbs,* 941 F.2d 119 (9th Cir. 1992), *cert. denied,* 508 U.S. 951 (1993), where the Third Circuit applied danger creation when a female nurse was assaulted the first time a violent offender was allowed to accompany her, unescorted, on rounds in prison facility.

The instant decision is inconsistent with these cases because it applies the danger creation doctrine where neither the allegations nor the evidence of record demonstrate the risk of a serious, immediate injury. The undisputed facts bear out that the risk was not immediate. Even assuming legal custody was not transferred until October 1993, the injury occurred in April 1994, six months later. Because there was no risk or threat of serious, immediate injury to the children when legal custody was transferred, no substantive due process claim has been stated. *See Martinez v. California,* 444 U.S. 277 (1980) (murder by parolee five months after release too remote to release for causation). The decision in *Currier*

conflicts with previous Tenth Circuit authority and cases from other circuits and guidance by this court is necessary to resolve this conflict.

III. The Petition Should be Granted Because the Tenth Circuit's Refusal to Determine as a Matter of Law the Date on Which Legal Custody Transferred to Vargas Fails to Protect the Substance of Qualified Immunity.

The Tenth Circuit refused to resolve, as a matter of law, an issue critical to the social workers' qualified immunity defense. The court accepted plaintiffs' allegation concerning the date of custody transfer as true, despite undisputed evidence on the record establishing a different date. Since only those events occurring before the transfer of custody are relevant to the danger creation theory, the date on which the transfer occurred is critical to the qualified immunity defense. The court's failure to determine the date of transfer as a matter of law constitutes a departure from the accepted course of judicial proceedings and improperly denied qualified immunity to Doran and Gonzales contrary to *Crawford-El v. Britton*, 523 U.S. 574 (1998).

Since Vargas undisputedly had both legal and physical custody of the children in April 1994, when the injuries at issue occurred, the only viable theory under which Doran and Gonzales can be held liable for violation of substantive due process rights is danger creation. Danger creation focuses on the affirmative acts of the officer in creating the danger. The social worker's conduct after Vargas was granted legal custody, assuming the critical date is when legal, not physical, custody was granted, is irrelevant to the danger creation theory. App. 29.

Therefore, the date on which Vargas gained custody is of critical importance. The parties do not dispute that Vargas gained physical custody of the children in May, 1993. The parties did dispute the date on which he was granted legal custody. The lower court ordered discovery on this limited issue. App. 76. Following this discovery, Doran and Gonzales filed a motion for summary judgment requesting the court determine that, based on orders entered by the New Mexico children's court and transcripts of hearings, legal custody transferred to Vargas in June, 1993. Transcript and Orders in App. at 82-99. The district court refused to determine the date legal custody transferred, stating that the date was not relevant to the issues before it. App. 66.

Doran and Gonzales pointed out the district court's error to the court of appeals and requested that that court determine from the record when legal custody transferred. The court of appeals refused this request and, instead, assumed as true plaintiffs' allegation that Vargas gained legal custody on October 19, 1993.[5] App. 28.

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[5] In denying rehearing, the Tenth Circuit referenced defendant Doran's statement in his motion for qualified immunity that the qualified immunity motion had to assume legal custody was granted on October 19, 1993. This was because the district court held in its first opinion that plaintiffs stated a claim (step one of the *Siegert* analysis) and in its second opinion denied qualified immunity. The motion for qualified immunity to the district court recognized the court's decision in its first opinion not to rule on the date legal custody was transferred. When the Tenth Circuit reviewed denial of qualified immunity, it reversed both opinions, including the district court's holding that actions after legal custody was transferred were relevant to danger creation, but still refused to decide the date of legal custody in making its qualified immunity determination.

The date on which Vargas gained legal custody is critical to Doran's and Gonzales' qualified immunity defense because that date determines what conduct is relevant to the danger creation theory. If the court finds that legal custody transferred to Vargas on June 21, 1993, then the only information Doran allegedly had about Vargas as of that time was that he was behind in child support payments. Such knowledge, even if assumed true, does not direct the conclusion that Vargas posed a physical threat to the children.

All discovery relative to the date of the transfer of legal custody was completed and all pertinent evidence was submitted. Plaintiffs did not request additional discovery on this issue. While the appellate court reversed the district court's ruling that both pre- and post- custody conduct were relevant to the danger creation theory, it failed to correct the district court's refusal to determine the date on which legal custody transferred to Vargas. The appellate court should have determined the custody date because the intent of the children's court orders is a matter of law to be determined from review of the orders entered. *EEOC v. Safeway Stores Inc.*, 611 F.2d 795, 798 (10th Cir. 1979), *cert. denied*, 446 U.S. 952 (1980); *Wolcott v. Wolcott*, 101 N.M. 665, 687 P.2d 100 (Ct.App. 1984).

In addition, it may not be necessary for the court to determine when legal custody was actually transferred. If the children's court orders are ambiguous as to the date legal custody transferred to Vargas, then Doran and Gonzales are entitled to qualified immunity based on their objectively reasonable assumption that their department did not have legal or physical custody after June, 1993. Qualified immunity presents an objective standard which relieves a state actor of liability where the law is not clearly established. *Romero v. Fay*, 45 F.3d 1472, 1478

(10th Cir. 1995) (qualified immunity does not turn on whether facts turn out to be true, but whether it was reasonable for officer to believe facts available to him). If the court charged with interpreting the meaning of the children's court orders finds them ambiguous, then it would be unreasonable to impose liability on a state actor for failing to determine whether legal custody had been transferred.

One of the purposes of qualified immunity is to spare a defendant not only unwarranted liability, but the demands of defending a lawsuit. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). Courts have an obligation to preserve the substance of the qualified immunity defense. *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) ("[T]he trial court must exercise its discretion in a way that protects the substance of the qualified immunity defense. It must exercise its discretion so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings."). To this end, the appellate court should have resolved, as a matter of law, the date of legal custody issue so that Doran and Gonzales are not subjected to unnecessary and burdensome discovery or trial proceedings. *See also, Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (qualified immunity is effectively lost if case is erroneously permitted to go to trial). The appellate court's refusal to resolve this issue, despite a complete record and the authority to do so, fails to preserve the substance of defendant's qualified immunity and constitutes a deviation from accepted judicial proceedings related to the defense of qualified immunity.

IV. Review is Warranted Because the Tenth Circuit Determined Whether the Law was Clearly Established by Analogy to Broad General Propositions, not in Light of the Specific Context of this Case, as Required by Decisions of this Court.

"A court evaluating a qualified immunity defense must first determine whether the plaintiff has alleged the deprivation of a constitutional right, and, if so, proceed to determine whether that right was clearly established at the time of violation." *Wilson v. Layne*, 526 U.S. 603, 609 (1999). "[T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: 'The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right . . . ' " *Saucier v. Katz*, ___ U.S. ___, 121 S.Ct. 2151, 2156 (2001), quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The right must have been defined at the appropriate level of specificity before the court can determine if it was clearly established. *Wilson*, 526 U.S. at 615, quoting *Anderson*, at 641. To determine if the right at issue in *Wilson* was clearly established, this Court looked first for cases which had comparable facts, i.e., cases involving media personnel riding along with police officers during the execution of arrest warrants at private residences. *Wilson*, 526 U.S. at 616-617. If there are no cases with comparable facts, then the court must determine whether cases at a higher level of generality could have provided the necessary notice. *Id.* In *Wilson* the court found that while there was case law involving somewhat similar facts which "anticipated" the holding regarding the constitutional right at issue in *Wilson*, that authority was not sufficient to conclude that the right was in fact clearly

established in advance of the events at issue in *Wilson*. *Id.* In *Saucier v. Katz*, the court held that the clearly established inquiry must be undertaken in light of specific context of cases, not as a broad general proposition. *Id.*, at 2156. The court noted that reasonable mistakes can be made as to the legal constraints on official conduct. *Id.*, at 2158. If the officer's mistake as to what the law requires is reasonable, he is entitled to qualified immunity.

The holdings in *Wilson* and *Saucier* make clear that earlier cases in which the constitutional right was considered must be sufficiently similar to the case at bar or the general law must be sufficient to support the conclusion that the right was clearly established so that the social workers would know in 1993 that they were violating the rights of the children. In the present case the Tenth Circuit relied upon cases with no factual similarity. App. 39-40, citing *Medina v. City & County of Denver*, 960 F.2d 1493 (10th Cir. 1992) (police create danger in reckless high speed police chase); *Reed v. Gardner, supra* (police create danger by arresting sober driver and leaving drunk driver with car); *Gregory v. City of Rogers*, 974 F.2d 1006 (8th Cir. 1992), *cert. denied*, 507 U.S. 913 (1993) (same); *Dwares v. City of New York*, 985 F.2d 94 (2nd Cir. 1993) (police create danger by telling skinheads they will not interfere if skinheads attack protestor at demonstration); *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992), *cert. denied*, 508 U.S. 951 (1993) (officials in correctional institution create danger by allowing violent sexual predator access to female nurse working alone); *Freeman v. Ferguson, supra* (police chief creates danger by ordering officers not to respond to woman's complaints that husband is violating restraining order); and *McComb v. Wambaugh, supra* (social workers not liable for danger creation for harm caused by

third party because their inaction did not create danger). The court also referenced the general elements cited in *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995). In its clearly established analysis, the court cited no cases decided before 1993 distinguishing *DeShaney's* ruling that return of a child to a parent is not a civil rights violation.

In the one case cited in the clearly established analogy that involved social workers, the holding was that social workers were protected by *DeShaney* because they did not create the danger, but failed to prevent it. *McComb v. Wambaugh*, 934 F.2d at 483. Thus, the only similar case held that a failure to prevent harm did not constitute a substantive due process violation. This is precisely what is alleged against Doran and Gonzales. They failed to prevent the father with physical custody from injuring his children. The distinction plaintiffs convinced the appellate court to recognize is subtle, too subtle to have been clearly established so that a social worker would have known he was violating rights in 1993.

The Tenth Circuit's analysis of the clearly established element conflicts with the rule established by this court in *Wilson* and *Saucier*. There are no prior cases cited by the Court of Appeals which involved facts comparable to those at issue in this case, namely, the application of the state created danger doctrine to a social worker and his supervisor where the social worker recommended continuation of custody of minor children with their father despite bruises on the children and abuse allegations by their mother during the children's stay with their father. Moreover, as shown above, *supra* at pp. 19-20, in 1995 and again in 1997, the Eleventh Circuit refused to find liability based on application of danger creation when a parent

had physical custody and the state had legal custody. Those cases are factually similar to *Currier*, but held that under *DeShaney*, social workers were not liable for injuries caused by natural parents.

CONCLUSION

Based on the foregoing, petitioners respectfully submit that this petition for writ of certiorari be granted.

Respectfully submitted,

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Dated: August 29, 2001

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

CHARLES C. CURRIER, as personal representative of the Estate of Anthony Michael Juarez, deceased; DEVONNE ESPERANZA JUAREZ, as mother and next friend of Latasha Juarez, a minor,	
Plaintiffs-Appellees,	
v.	No. 99-2287
TOM DORAN, SHIRLEY MEDINA, MELBA GONZALES, REGINA SENTELL, in their personal capacity,	No. 99-2288 (FILED MAR 1, 2001)
Defendants-Appellants,	
and	
KELLY ROBBINS, in her personal capacity,	
Defendant.	

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. CIV-97-477-BB/JHG)

Paula I. Forney, of Legal Bureau-Risk Management, Santa Fe, New Mexico, for Appellant Gonzales.

Timothy Flynn-O'Brien, Albuquerque, New Mexico, for Appellants Doran, Medina and Sentell.

Charles K. Purcell, of Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, New Mexico, (William S. Dixon of Rodey, Dickason, Sloan, Akin & Robb, P.A., and Michael L. Stout, of Roswell, New Mexico, with him on the briefs) for Plaintiffs-Appellees.

Before **SEYMOUR** and **MURPHY**, Circuit Judges, and **KANE**,* District Judge.

MURPHY, Circuit Judge.

I. INTRODUCTION

Plaintiffs, the representatives of two minor children abused by their father, brought suit pursuant to 42 U.S.C. § 1983 alleging Defendants violated their fundamental rights under the Fourteenth Amendment of the United States Constitution. Defendants Tom Doran, Shirley Medina, and Regina Sentell are social workers for the Children, Youth and Families Department of the State of

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* Honorable John L. Kane, Jr., Senior District Judge, United States District Court for the District of Colorado, sitting by designation.

New Mexico ("CYF"), and defendant Melba Gonzales is a supervisor for CYF.[1]

Defendants moved for summary judgment, arguing they were entitled to qualified immunity. The district court treated the motions as motions to dismiss. Defendants appeal the district court's denial of their motions. Jurisdiction to consider Defendants' appeal arises under 28 U.S.C. § 1291. *See Johnson v. Fankell*, 520 U.S. 911, 915 (1997) ("[A] Federal District Court order rejecting a qualified immunity defense on the ground that the defendant's actions – if proved – would have violated clearly established law may be appealed immediately as a 'final decision' within the meaning of the general federal appellate jurisdiction statute."). Because Plaintiffs have alleged a clearly established constitutional claim against Defendants Doran and Gonzales, these Defendants are not entitled to qualified immunity; this court therefore **affirms** the district court's denial of their motions for summary judgment. Because Plaintiffs have not alleged a viable constitutional claim against Defendant Sentell, this court **reverses** the district court's denial of her motion for summary judgment. Because the constitutional violation Plaintiffs state against Medina was not clearly established at the time of the events underlying this suit, this court **reverses** the district court's denial of Medina's motion for summary judgment.

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[1] CYF was formerly known as the Human Services Department of the State of New Mexico.

II. FACTS AND PROCEDURAL HISTORY

Plaintiffs allege the following facts in their complaint and in their response to Defendants' motions for summary judgment. On April 30, 1993, Defendant Medina visited the home of Devonne Juarez ("Juarez") to investigate a report of child neglect. Juarez is the natural mother of Latasha and Anthony Juarez, whose abuse prompted this lawsuit.[2] Medina found Latasha and Anthony, who were both under four years old, in the care of their five-year-old cousin. Medina discovered that Juarez had left the state. Medina removed Latasha and Anthony from the home and delivered the children into the physical custody of CYF.

On May 3, 1993, CYF petitioned the New Mexico Children's Court ("Children's Court") for an order formally granting legal custody of the children to CYF. Medina stated in an affidavit supporting the petition that Christopher Vargas, the father of Latasha and Anthony, had not supported the children and had allowed them to live in "alarming conditions." Medina had also been informed by an associate of Vargas that Vargas worked evenings and would "have a hard time taking care of the kids."

During this time Defendant Doran became aware of Vargas' history of financial irresponsibility, which included having made only eight child-support payments

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[2] Charles C. Currier is suing as personal representative of Anthony's estate, and Juarez represents Latasha, a minor, as mother and next friend.

in the preceding three years. On May 10, 1993, the Children's Court held a custody hearing. Doran attended but said nothing about Vargas' history of child-support payments. The Children's Court stated that "no parent, guardian, custodian or other person is able or willing to provide adequate supervision and care for the children." Nevertheless, based on the recommendation of Medina, the court granted physical custody of the children to Vargas while keeping legal custody with CYF.

At some point during the following months, Vargas was also awarded legal custody. Plaintiffs contend this occurred on October 19, 1993, and that Doran, either through his failure to investigate and report to the Children's Court or his affirmative recommendation to the Children's Court, was responsible for this decision. Defendants maintain Vargas assumed legal custody on June 23, 1993. The district court allowed limited discovery on this issue, but found it unnecessary to resolve the issue in denying Defendants' motions.

On July 22, 1993, Doran visited Latasha and Anthony at Vargas' home. Doran noticed a small bruise on Anthony's cheek; Vargas' girlfriend claimed the bruise was the result of a fall on the playground. On August 3, 1993, Anthony had another bruise when he arrived at the CYF office for a visit. This bruise was also attributed to a fall. Doran did not further investigate either bruise.

Juarez returned to New Mexico in August 1993. On August 25 and September 16, 1993, Juarez asserted to the children's guardian ad litem that Vargas and his fiancee were physically abusing Latasha and Anthony. Defendant Doran was told about at least one of these allegations but

failed to investigate. On August 31, 1993, during the course of a comprehensive psychological evaluation conducted at CYF's request, Juarez alleged that Vargas' fiancee punished Latasha and Anthony by dunking them in a bathtub full of water. Doran learned of these accusations but failed to investigate.

On October 15, 1993, during a visit between Juarez and the children at the CYF office, two bruises were noticed on Latasha's back. When Latasha was asked who gave her the bruises, she replied "Da, Da." On October 20, 1993, the guardian ad litem for Latasha and Anthony sent letters to Doran and Gonzales urging a thorough investigation of the recent observations of bruises on Latasha's back. Doran did interview Vargas and his fiancee about the bruises; they explained that the bruises had been caused by a bunk bed ladder which they had since thrown away.

On November 17, 1993, bruises were noticed on Anthony's face while he was in the CYF office. Vargas' fiancee claimed the bruises were the result of Anthony's fall from a bunk bed. CYF then removed Latasha and Anthony from Vargas' home and placed them with relatives. When questioned about the bruises on Anthony's cheek, Vargas explained to Doran that he had bitten Anthony on the cheek while wrestling on the floor, but that he did not think he had bitten Anthony "that hard." Latasha made some remarks indicating that "Ta Ta" had bitten Anthony to punish him. There were also bite marks on Latasha that Vargas could not explain. Doran prepared an affidavit for a November 19, 1993 meeting with Gonzales in which he indicated that the children would be subject to further abuse if permitted to stay with

Vargas. In the meeting, however, Doran failed to strongly advocate against return of the children to Vargas. Gonzales concluded the children had to be returned to Vargas, which occurred on November 19, 1993.

On January 10, 1994, a request for an investigation of possible physical abuse of Anthony was made to Defendant Sentell. Sentell received this request and referred it to Medina for further action. Medina discovered bruises on Anthony's buttocks but concluded the bruises were the result of a fall. During the visit Latasha told Medina that she was spanked with a belt.

On January 16, 1994, the children's guardian ad litem filed a report indicating that "Anthony and Latasha will be subject to further injury in their current home situation" and recommended monitoring the situation. Despite this recommendation, Medina and Doran then instructed Juarez to stop making allegations of abuse because it was traumatizing the children. On March 16, 1994, Doran referred another allegation of abuse to Sentell. Sentell discovered bruises on both Latasha and Anthony but concluded the injuries were not the result of abuse.

On April 16, 1994, Vargas poured boiling water on Anthony, causing Anthony severe burns over most of his body. When Doran learned of this incident, he went to Vargas' home, where he observed many indications of violence. Doran removed Latasha, who was covered with bruises, from Vargas' home and took her to the emergency room. Doctors at the emergency room indicated that Anthony was bruised everywhere he was not burned. Defendants then sought and gained custody of

the children on CYF's behalf. Anthony died in an intensive care unit on May 3, 1994.

Plaintiffs filed this lawsuit in the United States District Court for the District of New Mexico, claiming Defendants had violated Latasha and Anthony's rights under the Fourteenth Amendment. After the completion of the limited discovery referred to above, Medina and Doran moved for summary judgment on the grounds that *DeShaney v. Winnebago County Department of Social Services* precluded Plaintiffs' claims. 489 U.S. 189 (1989). Defendant Gonzales independently moved for summary judgment, raising the same argument. Gonzales also maintained, however, that even if *DeShaney* did not foreclose Plaintiffs' claims, the law was not clearly established at the time of the underlying events and thus she was entitled to qualified immunity. The district court issued a memorandum opinion and order stating that *DeShaney* did not foreclose Plaintiffs' claims but concluding the law was not clearly established at the time of the events underlying this suit. *See Currier v. Doran*, 23 F.Supp.2d 1277, 1279-83 (D.N.M.1998) Thus, the district court denied Medina and Doran's motion and granted Gonzales' motion. *See id.* at 1283.

The district court subsequently issued an order withdrawing the portion of its memorandum opinion dealing with the issue of whether the law was clearly established during the events underlying the suit, apparently because counsel for Gonzales had raised the issue in her brief to the court but failed to do so in her brief to Plaintiffs' counsel. *See Currier v. Doran*, No. CIV 97-0477 BB/JHG, slip op. at 1-2 (D.N.M. Aug. 19, 1999). Doran, Medina,

and Sentell then joined Gonzales in moving for summary judgment based on qualified immunity.

The district court again held that *DeShaney* did not preclude Plaintiffs' claims. *See id.* at 6-10. The district court also concluded that at the time of the events underlying the suit it was clearly established Defendants' alleged conduct could be the source of a constitutional violation, reversing its prior memorandum opinion. *See id.* at 2-6. Thus, the district court denied Defendants' motions for summary judgment. *See id.* at 10.

III. DISCUSSION

A. Standard of Review

Although Defendants' motions were filed as motions for summary judgment, the district court treated them as motions to dismiss because discovery had been limited to the question of when legal custody was given to Vargas. Thus, all the allegations in Plaintiffs' complaint were accepted as true. *See Williams v. Meese*, 926 F.2d 994, 997 (10th Cir. 1991). The district court also relied on additional facts disclosed in the limited discovery and alleged by Plaintiffs in their response to Defendants' motions for summary judgment.

Defendants argue that because matters outside the pleadings were considered it was error for the district court to apply a motion to dismiss standard rather than a summary judgment standard. Defendants' argument, however, would have left the district court with the

option of either referring solely to the complaint or determining whether the minimal evidence then available warranted a trial. Plaintiffs could not properly respond to a factual challenge to their complaint because the district court had allowed discovery only on the limited question of when legal custody was granted to Vargas. In addition, it would have been odd to prohibit Plaintiffs from relying on additional facts disclosed during that discovery. As Plaintiffs correctly note, they could have amended their complaint to include the new information as factual allegations. Thus, the district court properly treated Defendants' motions as motions to dismiss. *See* Fed. R. Civ. P. 56(f) (stating that when the nonmovant cannot respond to a summary judgment motion the court "may order a continuance to permit . . . discovery to be had or *may make such other order as is just*" (emphasis added)).

Whether Plaintiffs have stated a claim for which relief may be granted is a question of law this court reviews *de novo*. *See Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999). Similarly, whether the law on which Plaintiffs rely was clearly established at the time of the events underlying this suit is also a question of law subject to *de novo* review. *See Armijo v. Wagon Mound Pub. Sch.*, 159 F.3d 1253, 1260 (10th Cir. 1998). All of Plaintiffs' allegations are accepted as true. *See Williams*, 926 F.2d at 997.

B. Heightened Pleading Requirement

Defendants correctly note that this court requires plaintiffs to meet a heightened pleading requirement once a defendant raises the defense of qualified immunity. *See*,

e.g., Breidenbach v. Bolish, 126 F.3d 1288, 1292 (10th Cir. 1997); *Sawyer v. County of Creek,* 908 F.2d 663, 667 (10th Cir. 1990). The heightened pleading standard requires plaintiffs to "do more than assert bare allegations of a constitutional violation." *Breidenbach,* 126 F.3d at 1293. The plaintiff's complaint must include " 'all of the factual allegations necessary to sustain a conclusion that defendant violated clearly established law.' " *Id.* (quoting *Dominque v. Telb,* 831 F.2d 673, 676 (6th Cir. 1987)). The factual allegations must be "specific" and "non-conclusory," and sufficient for a district court to determine that those facts, if proved, demonstrate the defendant is not entitled to qualified immunity. *Id.* The heightened pleading requirement is an exception to the notice pleading standard in Rule 8 of the Federal Rules of Civil Procedure and "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957).

Plaintiffs question whether this court's heightened pleading requirement survives the recent Supreme Court case of *Crawford-El v. Britton,* 118 S. Ct. 1584 (1998). Although we are generally bound by the prior precedent of this court, there is an exception to this rule when that precedent is superceded by contrary decisions of the Supreme Court. *See United States v. Bell,* 154 F.3d 1205, 1209 n.6 (10th Cir. 1998); *United States v. Erving L.,* 147 F.3d 1240, 1246 (10th Cir. 1998). This court has recognized on several occasions the possibility that *Crawford-El* might affect this court's heightened pleading requirement, but has yet to resolve that question in a published,

precedential opinion. *See Ramirez v. Dep't of Corr.*, 222 F.3d 1238, 1241 n.2 (10th Cir. 2000); *see also Smith v. Dep't of Human Servs.*, No. 00-6046, 2000 WL 1480259, at *2 n.2 (10th Cir. Oct. 6, 2000) (unpublished disposition); *Watkins v. Colo. Dep't of Corr.*, No. 98-1063, 1999 WL 594584, at *1 (10th Cir. Aug. 9, 1999) (unpublished disposition). *See generally* Patricia M. Wald, *Summary Judgment at Sixty*, 76 Tex. L. Rev. 1897, 1925 & n.187 (suggesting that *Crawford-El* puts an end to judicially-crafted heightened pleading requirements in qualified immunity cases). Because application of the heightened pleading requirement affects the outcome of this case, this court must consider its continued viability after *Crawford-El*.

The heightened pleading requirement is premised on "the purpose of the qualified immunity doctrine itself." *Breidenbach*, 126 F.3d at 1292. More specifically, this court has linked the heightened pleading requirement to the Supreme Court case of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982):

> When the Supreme Court reformulated its qualified immunity test in *Harlow* to focus on the "objective reasonableness" of an officer's actions as opposed to his or her subjective intent, the Court sought to shield government officials not only from the "substantial costs" of subjecting officials to the risks of trial, but also from "[j]udicial inquiry into subjective motivation," including "broad-ranging discovery and the deposing of numerous persons." The Court held that such inquiries "can be peculiarly disruptive of effective government." In keeping with this important concern for shielding government officers from burdensome discovery in cases where subjective intent is at issue, this

> court and several other circuits have imposed a more stringent pleading requirement where a qualified immunity defense is asserted.

Breidenbach, 126 F.3d at 1292 (citations omitted).

In *Harlow* the Supreme Court reconsidered qualified immunity law as it existed at the time. Before *Harlow* a plaintiff could defeat a government official's defense of qualified immunity two ways: by demonstrating the official knew or should have known her action was unconstitutional (referred to by the Court as the "objective element" of qualified immunity) or by demonstrating the official acted with the malicious intent to cause injury (the "intent element" of qualified immunity[3]). *See Harlow*, 457 U.S. at 815. In *Harlow*, however, the Court decided the intent element of qualified immunity had proved in practice to be incompatible with the overall goal of qualified immunity, which is to prevent government officials from being disrupted by a trial of insubstantial claims. *See id.* at 815-17. The Court explained that because the question of an official's intent to cause harm could not usually be disposed of at summary judgment, many plaintiffs were proceeding to trial against government officials on insubstantial claims because the plaintiffs were able to easily create an issue of fact on whether the government official had the subjective intent to harm them. *See id.* at 815-18. The Court eliminated the intent element of qualified immunity, reasoning that "bare allegations of malice

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[3] The Supreme Court in *Harlow* actually referred to the latter option as the "subjective element," but for clarity this opinion will instead refer to this option as the "intent element." *See Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982).

should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Id.* at 817-18.[4]

Thus, after *Harlow*, a plaintiff can defeat a defendant's claim of qualified immunity only by demonstrating the defendant violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. After *Harlow*, many circuits imposed upon plaintiffs a heightened pleading requirement, similar to this court's, once qualified immunity was raised as a defense. *See, e.g., Branch v. Tunnell*, 14 F.3d 449, 452 (9th Cir. 1994); *Gooden v. Howard County*, 954 F.2d 960, 969-70 (4th Cir. 1992); *Elliott v. Thomas*, 937 F.2d 338, 344-45 (7th Cir. 1991).

In *Crawford-El* the Supreme Court examined the D.C. Circuit Court of Appeal's heightened burden of proof. The D.C. Circuit's heightened-proof standard applied when a plaintiff sued a government official, the government official asserted the defense of qualified immunity, and the plaintiff's cause of action depended on proving improper motive of the defendant. *See Crawford-El*, 118 S. Ct. at 1588-91. The D.C. Circuit's heightened burden of proof, applicable at both summary judgment and trial,

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[4] Intent, however, remains an element of a plaintiff's affirmative case in some instances. In *Harlow*, the Court dealt only with the defense of qualified immunity. Many constitutional claims brought pursuant to 42 U.S.C. § 1983, however, require proof that the government official acted with a prohibited mindset, and *Harlow* does not alter what plaintiffs are required to prove on these claims. *See Crawford-El*, 118 S. Ct. 1592.

required plaintiffs to prove by clear and convincing evidence defendant's improper motive. *See id.* at 1590. Justice Stevens, writing for a majority of the Court, expansively framed the issue before the Court in *Crawford-El* as follows:

> The broad question presented is whether the courts of appeals may craft special procedural rules for [improper-motive] cases to protect public servants from the burdens of trial and discovery that may impair the performance of their official duties. The more specific question is whether, at least in cases brought by prisoners, the plaintiff must adduce clear and convincing evidence of improper motive in order to defeat a motion for summary judgment.

Id. at 1587.

Ultimately, the Supreme Court rejected the D.C. Circuit's heightened burden of proof. *See id.* at 1596. The D.C. Circuit had justified its heightened burden of proof requirement, like this court justifies its heightened pleading requirement, on the Supreme Court's opinion in *Harlow*. *See id.* at 1590. The Court explained, however, that neither the specific holding in *Harlow* nor its reasoning justified the D.C. Circuit's heightened burden of proof. *See id.* at 1591-96.

The Court carefully distinguished *Harlow* as a case dealing only with the defense of qualified immunity: *Harlow* "did not implicate the elements of the plaintiff's initial burden of proving a constitutional violation" nor "address any question concerning the plaintiff's affirmative case." *Id.* at 1592, 1591. The Court explained that

although the decision in *Harlow* was motivated by a concern that public officials be protected from the costs associated with defending against lawsuits, particularly baseless ones, it did not follow that a defendant's claim of qualified immunity could always be resolved before at least some discovery was conducted. *See id.* at 1593-94 & 1594 n.14. In addition, the Court commented that a heightened proof standard "alters the cause of action itself in a way that undermines the very purpose of § 1983 – to provide a remedy for the violation of federal rights." *Id.* at 1595.

The Court in *Crawford-El* also observed that neither federal statutory law nor the Federal Rules of Civil Procedure gave any support to the heightened burden of proof. *See id.* at 1595. In language particularly relevant to this court's heightened pleading requirement, the Supreme Court stated the following:

> In the past we have consistently declined similar invitations to revise established rules that are separate from the qualified immunity defense. We refused to change the Federal Rules governing pleading by requiring the plaintiff to anticipate the immunity defense, *Gomez*, 446 U.S., at 639-640, or requiring pleadings of heightened specificity in cases alleging municipal liability, *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164-169, (1993). We also declined to craft an exception to settled rules of interlocutory appellate jurisdiction and rejected the argument that the policies behind the immunity defense justify interlocutory appeals on questions of evidentiary sufficiency. *Johnson v. Jones*, 515 U.S. 304, 317-318 (1995). Our reasons for those unanimous

> rulings apply with equal force to the imposition of a clear and convincing burden of proof in cases alleging unconstitutional motive.
>
> As we have noted, the Court of Appeals adopted a heightened proof standard in large part to reduce the availability of discovery in actions that require proof of motive. To the extent that the court was concerned with this procedural issue, our cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process. See, *e.g.*, *Leatherman*, 507 U.S., at 168-169.

Crawford-El, 118 S. Ct. at 1595 (duplicate citations omitted).

The Seventh Circuit has recently cited *Crawford-El* for the proposition that "[c]ivil rights complaints are not held to a higher standard than complaints in other civil litigation." *Nance v. Vieregge*, 147 F.3d 589, 590 (7th Cir. 1998). *But see Elliott*, 937 F.2d at 344-45 (explaining, prior to issuance of *Crawford-El*, the Seventh Circuit's heightened pleading requirement). Similarly, the D.C. Circuit, the very court from which Crawford-El appealed to the Supreme Court, has recently stated that the Supreme Court "held [in *Crawford-El*] that plaintiffs making constitutional claims based on improper motive need not meet any special heightened pleading standard." *See Harbury v. Deutch*, 233 F.3d 596, 611 (D.C. Cir. 2000). The First Circuit, however, has concluded that *Crawford-El* does not affect its heightened pleading requirement. *See Judge v.*

City of Lowell, 160 F.3d 67, 72-75 (1st Cir. 1998).[5] In upholding their heightened pleading requirement, the First Circuit relied on the following language from *Crawford-El:*

> In *Harlow* we noted that a " 'firm application of the Federal Rules of Civil Procedure' is fully warranted" and may lead to the prompt disposition of insubstantial claims. 457 U.S., at 819-20, n.35 (quoting *Butz*, 438 U.S., at 508). Though we have rejected the Court of Appeals' solution, we are aware of the potential problem that troubled the court. It is therefore appropriate to add a few words on some of the existing

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[5] Although various Sixth Circuit cases have touched upon *Crawford-El*'s impact on its heightened pleading requirement, it does not appear a firm resolution has been reached. *See Thaddeus-X v. Blatter*, 175 F.3d 378, 399 (6th Cir. 1999) (en banc) (plurality opinion) (stating, in the resolution of a motion for summary judgment, that "*Crawford-El* disallows any type of 'heightened pleading standard' to avoid" analyzing the subjective motivation of the defendant); *Kain v. Nesbitt*, 156 F.3d 669, 672 n.4, 673 (6th Cir. 1998) (first distinguishing between burdens of proof and pleading requirements but later noting that defendants are not "at the mercy of vague generalized pleadings" because *trial courts* may require specific pleading from a plaintiff); *Kesterson v. Moritsugu*, No. 96-5898, 1998 WL 321008, at *4 (6th Cir. June 3, 1998) (unpublished disposition) (explaining that plaintiff's complaint was not held to a heightened pleading standard); *id.* at *8-10 (Moore, C.J., dissenting) (accusing the majority of applying a heightened pleading standard and arguing the standard is not proper after *Crawford-El*); *Smith v. Bd. of County Comm'rs*, No. 97-3107, 1998 WL 321045, at *2 (6th Cir. June 2, 1998) (unpublished disposition) (applying the Sixth Circuit's heightened pleading requirement but noting that the Supreme Court in *Crawford-El* approved a *trial court's* requirement of specificity).

> procedures available to federal trial judges in handling claims that involve examination of an official's state of mind.
>
> When a plaintiff files a complaint against a public official alleging a claim that requires proof of wrongful motive, the trial court must exercise its discretion in a way that protects the substance of the qualified immunity defense. It must exercise its discretion so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings. The district judge has two primary options prior to permitting any discovery at all. First, the court may order a reply to the defendant's or a third party's answer under Federal Rule of Civil Procedure 7(a), or grant the defendant's motion for a more definite statement under Rule 12(e). Thus, the court may insist that the plaintiff "put forward specific, nonconclusory factual allegations" that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment. *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (KENNEDY, J., concurring in judgment). This option exists even if the official chooses not to plead the affirmative defense of qualified immunity.

Crawford-El, 118 S. Ct. at 1596-97 (duplicate citations omitted).

This court respectfully disagrees with the First Circuit in its conclusion that the above language from *Crawford-El* saves circuit-imposed heightened pleading requirements. The passage in reality constitutes a rejection of deviations from the Federal Rules of Civil Procedure combined with an instruction to federal trial

judges to exercise their discretion under the Federal Rules to manage cases in a way that serves both the purposes of qualified immunity and § 1983. *See id.* at 1596-98. Furthermore, the Court in *Crawford-El* was careful to distinguish between the D.C. Circuit's solution to protect government officials from insubstantial claims, which it rejected, and the options otherwise available under the Federal Rules of Civil Procedure for *federal trial judges* to deal with this concern. *See id.; see also id.* at 1587 (defining the broad issue presented in the case as whether "the *courts of appeals* may craft special procedural rules" for cases involving constitutional claims of improper motive against government officials (emphasis added)). This court's analysis is buttressed by the following language in *Crawford-El:*

> It is the district judges rather than appellate judges like ourselves who have had the most experience in managing cases in which an official's intent is an element. Given the wide variety of civil rights and "constitutional tort" claims that trial judges confront, broad discretion in the management of the factfinding process may be more useful and equitable to all the parties than the categorical rule imposed by the Court of Appeals.

Id. at 1598. Thus, the circuit courts are admonished in civil rights cases not to impose management rules which deviate from those express in the statute and rules of procedure, and the district courts are encouraged to use the provisions of the Federal Rules of Civil Procedure to manage these cases.

We conclude that this court's heightened pleading requirement cannot survive *Crawford-El.* There is no relevant difference between the D.C. Circuit's heightened burden of proof at summary judgment and this court's heightened pleading requirement which justifies the continuing viability of the latter after *Crawford-El. See Nance,* 147 F.3d at 590 (citing *Crawford-El* for the proposition that "civil rights complaints are not held to a higher standard than complaints in other civil litigation"). Like the D.C. Circuit's heightened burden of proof, this court's heightened pleading requirement was based on *Harlow. See Breidenbach,* 126 F.3d at 1292. Nevertheless, as the Supreme Court made clear in *Crawford-El,* neither the holding nor the reasoning of *Harlow,* a qualified immunity case, warranted a change in the requirements of a plaintiff's affirmative case. *See Crawford-El,* 118 S. Ct. at 1590-94. Like the D.C. Circuit's heightened proof requirement, this court's heightened pleading requirement finds no support in the Federal Rules of Civil Procedure and constitutes a deviation from the notice-pleading standards of Rule 8. *See* Fed. R. Civ. P. 8(a) ("A pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief. . . . "); Fed. R. Civ. P. 9(b) ("Malice, intent, knowledge, and other condition of mind of a person may be averred generally."). Additionally, the manner in which the Court framed the "broad" question presented for appeal – "whether the courts of appeals may craft special procedural rules for [civil rights cases that require proof of improper motive] to protect public servants from the burdens of trial and discovery" – suggests that the Court's ruling is not limited to the D.C.

Circuit's heightened burden of proof. *See Crawford-El*, 118 S. Ct. at 1587. Finally, to the extent the Supreme Court considered whether a court may require a plaintiff to plead " 'specific, nonconclusory factual allegations' " to survive a prediscovery motion for dismissal, it concluded this option resides in the discretion of federal trial judges, not federal circuit courts. *Id.* at 1596-97 (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in judgment)).

This court reiterates that trial judges retain discretion to order a reply to a defendant's answer, grant a defendant's motion for a more definite statement, or tightly confine discovery. *See* Fed. R. Civ. P. 7(a), 12(e); *Crawford-El*, 118 S.Ct. at 1596-97. The district court in this case, however, thought Plaintiffs had alleged sufficient facts to be allowed discovery. *See Currier v. Doran*, No. CIV 97-0477 BB/JHG, slip op. at 7 (D.N.M. Aug.19, 1999) ("The Court cannot say Plaintiffs would be unable to recover damages from Doran under any set of facts alleged in the complaint."); *id.* at 8 ("[T]he Court believes Plaintiffs have alleged sufficient facts to be allowed discovery. . . . "); *id.* at 9 ("Given the stay of discovery that has been imposed in this case, it would not be fair to require the Plaintiffs to assert more facts than they have been able to allege at this point."). Therefore, this court will review Defendants' motions under the customary motion to dismiss standard: "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46.

C. Constitutional Violation

Once a defendant raises the defense of qualified immunity in the context of a motion to dismiss, a court must first determine whether the plaintiff has asserted a violation of federal law. *See Ramirez*, 222 F.3d at 1241; *Dill v. City of Edmond*, 155 F.3d 1193, 1204 (10th Cir. 1998). In this case Plaintiffs allege that their Fourteenth Amendment rights were violated when Defendants affirmatively removed them from the custody of their mother and then placed them in the custody of their abusive father. Plaintiffs also allege Defendants violated their Fourteenth Amendment rights by failing to protect them while they were in state custody and by failing to protect them once they were placed in the custody of their father.

Defendants maintain Plaintiffs' claims are barred by *DeShaney*. In *DeShaney* the Supreme Court considered the Fourteenth Amendment claims of Joshua Deshaney, a victim of severe child abuse, against the local department of social services and the employees thereof. *See DeShaney*, 489 U.S. at 191. Joshua lived with his natural father. In 1982, the Winnebago County Department of Social Services ("DSS") first investigated abuse charges against Joshua's father. The DSS took no action to remove Joshua at the time. In 1983 Joshua was admitted to a hospital with multiple bruises and abrasions. DSS obtained an order placing Joshua in the temporary custody of the hospital. DSS, along with other professionals assembled by the county to assess Joshua's situation, decided there was insufficient evidence of child abuse to retain Joshua in the custody of the court. For the next six months the assigned DSS caseworker was made aware of several factors indicating that Joshua was being abused,

but DSS took no action. Joshua was eventually beaten so violently that he fell into a life-threatening coma. *See id.* at 192-93.

Joshua claimed DSS and its employees had violated his constitutional rights by "failing to intervene to protect him against a risk of violence at his father's hands of which they knew or should have known." *Id.* The Supreme Court rejected Joshua's claim. The Court stated that the Due Process Clause "generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *Id.* at 196. The Court, however, went on to state the following:

> While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect Joshua.

Id. at 201.

Relying on the above language in *DeShaney*, this court has held that "state officials can be liable for the acts of third parties where those officials 'created the danger' that caused the harm." *Seamons v. Snow*, 84 F.3d

1226, 1236 (10th Cir. 1996) (quoting *Uhlrig v. Harder*, 64 F.3d 567, 572 (10th Cir. 1995)). In *Armijo*, this court delineated the contours of a "danger creation" cause of action. *See* 159 F.3d at 1262-63.To make out a proper danger creation claim, a plaintiff must demonstrate that (1) the charged state entity and the charged individual actors created the danger or increased plaintiff's vulnerability to the danger in some way; (2) plaintiff was a member of a limited and specifically definable group; (3) defendants' conduct put plaintiff at substantial risk of serious, immediate, and proximate harm; (4) the risk was obvious or known; (5) defendants acted recklessly in conscious disregard of that risk; and (6) such conduct, when viewed in total, is conscience shocking. *See id.*

Defendants, relying on *DeShaney*, argue that Plaintiffs have not alleged a constitutional violation because custody was simply transferred from one natural parent to another; thus, Defendants claim, they did not create the danger. *DeShaney* does not, however, compel this conclusion. In this case, Anthony and Latasha were removed from their mother and placed with their father. In *DeShaney*, Joshua was removed from his father and then returned to his father. *See DeShaney*, 489 U.S. at 192. Anthony and Latasha would not have been exposed to the dangers from their father but for the affirmative acts of the state; the same cannot be said for Joshua in *DeShaney*.

The limited caselaw does not support Defendants' theory that they are shielded by *DeShaney* because Anthony and Latasha were placed in the custody of their

natural father. In *Ford v. Johnson,* the United States District Court for the Eastern District of Pennsylvania considered the constitutional claims of the mother of a child who had been beaten to death by his father. *See* 899 F. Supp. 227, 233 (E.D. Pa. 1995). The child had been in state custody before being placed with her father by court order after an investigation and recommendation by local social workers. *See id.* The court decided that the mother had stated a constitutional claim by alleging that the social workers failed to investigate the father and failed to report information to the juvenile court which would have disqualified the father from gaining custody. *See id.* at 232. The court stated that just because "the child is placed with a parent as opposed to a foster parent should not change the standards by which social agencies and their employees conduct their investigations." *Id.* at 233.

Similarly, in *Tazioly v. City of Philadelphia,* the same court held that the "state-created danger theory may apply in cases where a state actor has rendered a minor more vulnerable to injury at the hands of the minor's biological parent." No. CIV.A. 97-CV-1219, 1998 WL 633747, at *11 (E.D.Pa. Sept. 10, 1998) (unpublished disposition). In *Tazioly* the City Department of Human Services removed a child from a foster parent and placed him in the custody of his mother. The court distinguished *DeShaney* by noting that in *DeShaney* there was insufficient evidence of abuse to retain the child in state custody, while defendant social workers in the *Tazioly* case had actual knowledge that the biological mother was "unfit and dangerous." *Id.* at *9.

While language in the Seventh Circuit's opinion in *K.H. v. Morgan*, 914 F.2d 846, 852-53 (7th Cir. 1990), suggests that placing a child with a family member might insulate the state from constitutional liability, the Seventh Circuit seems to have since reconsidered its earlier dicta. In a recent case involving a suit brought against social workers as the result of injuries suffered while a child was abused at her father's home, the court stated that "[i]f the [social workers] knowingly placed [plaintiff] in a position of danger, they would not be shielded from liability by the decision in *DeShaney*." *Bank of Ill. v. Over*, 65 F.3d 76, 78 (7th Cir. 1995). Furthermore, the reasoning used by the Seventh Circuit in *Morgan* actually supports constitutional liability when custody is transferred from one parent to another. The court stated that "[t]he state could have left [plaintiff] to the tender mercies of her parents without thereby violating her rights under the Constitution. But having removed her from their custody the state assumed at least a limited responsibility for her safety." *Morgan*, 914 F.2d at 849. Under this reasoning it would be arbitrary to allow the state to avoid this responsibility merely by placing the child with another relative. *See S.S. v. McMullen*, 225 F.3d 960, 968 (8th Cir. 2000) (en banc) (Gibson, J., dissenting) ("These distinctions . . . between foster parents and natural parents [ ] are arbitrary."), *petition for cert. filed*, 69 U.S.L.W. 3410 (U.S. Dec. 8, 2000) (No. 00-946).

Thus, neither *DeShaney* nor other authorities shield the Defendants. When the state affirmatively acts to remove a child from the custody of one parent and then places the child with another parent, *DeShaney* does not foreclose constitutional liability.

Having established that *DeShaney* does not foreclose liability, we now examine each of the Defendants individually to determine if Plaintiffs have pleaded sufficient facts to state a cause of action under the danger creation theory.

1. Doran

Doran first became involved in the case before the May 10, 1993, custody hearing granting physical custody to Vargas and legal custody to CYF. At the hearing Doran failed to alert the Children's Court to Vargas' history of financial irresponsibility. Just a short time later, in late July and early August, Doran noticed bruises on the children and did not investigate further after being told the bruises were the result of falls.Three times during the late summer of 1993, Juarez made allegations that Vargas and his girlfriend were abusing the children, including the very specific accusation that the children were dunked in a bathtub full of water as punishment; Doran did not investigate these allegations. On October 19, 1993, Doran was responsible for the Children's Court's decision to grant Vargas legal custody, through either his failure to investigate and report to the court or through his affirmative recommendation.[6]

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[6] The parties appear to agree that legal custody, not physical custody, is the benchmark date by which to analyze Plaintiffs' claims. There is conflicting evidence as to when legal custody was granted Vargas; Plaintiffs claim legal custody was awarded on October 19, 1993, while Defendants argue legal custody was transferred on June 23, 1993. The district court allowed discovery on this limited question, but did not decide

Plaintiffs also make various allegations as to Doran's involvement after legal custody was awarded to Vargas. The district court considered these post-custody allegations in determining that Plaintiffs had met the requirements of danger creation liability. *See Currier v. Doran*, No. CIV 97-0477 BB/JHG, slip op. at 6-7 & n.3 (D.N.M. Aug. 19, 1999). The danger creation theory, however, focuses on the affirmative actions of the state in placing the plaintiff in harm's way. Plaintiffs cannot rely on Defendants' failure to intervene once custody was given to Vargas to state a danger creation claim if the Defendants' affirmative conduct in placing the child with Vargas does not satisfy the *Armijo* danger creation requirements. As the Supreme Court stated in *DeShaney*, "the State does not become the permanent guarantor of an individual's safety by having once offered him shelter." *DeShaney*, 489 U.S. at 201. Thus, we will only consider Doran's conduct before legal custody was given to Vargas.

Doran's conduct meets the danger creation theory of liability spelled out in *Armijo*. Doran "created the danger or increased the plaintiff[s'] vulnerability to the danger" through his failure to investigate the numerous bruises and allegations of abuse and his responsibility for the court order granting legal custody to Vargas.[7] *Armijo*, 159

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the issue. *See Currier v. Doran*, No. CIV 97-0477 BB/JHG, slip op. at 2 (D.N.M. Aug.19, 1999). Because we are treating Defendants' motions as motions to dismiss, we will assume that legal custody was given to Vargas on October 19, 1993, as Plaintiffs allege.

[7] It is true that the conduct Plaintiffs complain of is partially a failure by Doran to act on particular allegations of

F.3d at 1263; *see also Ford,* 899 F. Supp. at 233 (finding a constitutional claim was stated against defendant social workers who failed to investigate and report to juvenile court circumstances concerning father given custody of a child he subsequently beat to death). Latasha and Anthony were members "of a limited and specifically definable group": children the state has removed from their natural parent and taken into state custody. *Armijo,* 159 F.3d at 1262 (quotation omitted). By failing to investigate the allegations of child abuse and by recommending that Vargas assume legal custody, Doran's conduct put Anthony and Latasha at obvious risk of serious, immediate, and proximate harm, a harm that Doran recklessly and consciously disregarded.

It is a somewhat closer question whether Doran's conduct is "conscience shocking." *Id.* at 1263 (quotation omitted). This court has recognized three basic principles guiding the evaluation of substantive due process claims that are particularly relevant to this determination: (1) the general need for restraint; (2) the concern that § 1983 not replace state tort law; and (3) the need for deference to local policy decisions impacting public safety. *See Uhlrig v. Harder,* 64 F.3d 567, 573 (10th Cir. 1995). *Armijo* involved a decision by school officials to send home a

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abuse. Doran's failure to investigate allegations of abuse while the children were in state legal custody should be distinguished, however, from a claim that the state failed to rescue the children once legal custody was given to Vargas. Doran's failure to investigate allegations of abuse should be viewed in the general context of the state's affirmative conduct in removing the children from their mother and placing the children with their father.

distraught and potentially suicidal student, when it was known that there were firearms present at his house and that his parents were not home, despite school disciplinary policy that prevented out-of-school suspensions when a student's parent was not home. *Armijo*, 159 F.3d at 1256-57. This court determined that this decision could be "construed as conscience-shocking, depending on context as determined after a full trial." *Id.* at 1264.

The allegations in Plaintiffs' complaint against Doran, if true, are at least as conscience-shocking as the facts in *Armijo*. It is important to remember that Doran's conduct must be "viewed in total," and thus the cumulative impression of Doran's conduct should be considered. *Id.* In light of the initial information Doran had about Vargas' financial irresponsibility, and in light of the numerous bruises and allegations of abuse, Doran's failure to investigate the bruises and allegations and his subsequent responsibility for the court order granting Vargas legal custody could be conscience shocking, depending, of course, on further context as provided by discovery. *See id.* Thus, Plaintiffs have alleged sufficient facts to support a danger creation claim against Doran.

2. Sentell

Defendant Sentell's limited involvement in this matter came only after Vargas had been awarded both physical and legal custody. On January 10, 1994, a request for an investigation of possible physical abuse of Anthony was made to Sentell. Sentell reviewed the file on Doran's November investigation of abuse and then referred the request to Medina for further action. On March 16, 1994,

Doran referred another allegation of abuse to Sentell. Sentell discovered bruises on both Latasha and Anthony but concluded the injuries were not the result of abuse.

Plaintiffs do not argue that Sentell was personally involved in creating the danger the children faced. Instead, Plaintiffs argue Sentell was constitutionally required to rescue the children because she was aware that her fellow co-workers had created the danger.

This court has stated that "state officials may be liable for injuries caused by a private actor where *those officials* created the danger that led to the harm." *Sutton*, 173 F.3d at 1237 (emphasis added). In *Sutton*, this court refused to extend constitutional liability against one state defendant because he had not affirmatively created a dangerous situation, even though another state actor had created the dangerous situation. *See id.* at 1239. Plaintiffs distinguish *Sutton* by noting that Sentell, unlike the defendant in *Sutton*, was aware that other state actors had created the danger and was presented with a clear opportunity to rescue the children. Although this is perhaps a closer case than *Sutton*, Sentell nevertheless had no constitutional duty to rescue the children. The language of *Sutton* explaining that only officials who created the danger might have a duty to rescue, the principle that the "Due Process Clauses generally confer no affirmative right to government aid," and the general need for restraint in evaluating substantive due process claims all dictate the conclusion that Sentell had no constitutional duty to rescue. *DeShaney*, 489 U.S. at 196; *see also Uhlrig*, 64 F.3d at 573 (recognizing the need for restraint in evaluating substantive due process claims). Thus, because Plaintiffs have not alleged a constitutional violation by

Sentell, the district court's denial of Sentell's motion is reversed.

3. Medina

Defendant Medina made the initial visit to Juarez's home, removed the children from the home, and delivered them into the physical custody of CYF. Medina conducted an investigation and reported in the custody hearing that Vargas had not supported the children while they were with Juarez. Medina then had no involvement in the case until after physical and legal custody was transferred to Vargas. On January 10, 1994, Medina investigated an abuse charge. Medina found bruises on Anthony's buttocks but concluded the bruises were the result of a fall. During this visit, Latasha told Medina that she had been spanked with a belt. Medina's last involvement in the case came when she instructed Juarez to stop making allegations of abuse because it was traumatizing the children.

Medina's involvement in the initial removal of the children from Juarez cannot support a danger creation claim. Moreover, the January 10, 1994, investigation by Medina came after legal and physical custody had been transferred to Vargas. Because Medina did not create the danger, and because Medina is not constitutionally required to rescue a plaintiff from danger created by another state actor, Medina was not constitutionally obligated to rescue the children during the January 1994 visit.

Plaintiffs argue that Medina can be liable for danger creation because she instructed Juarez to stop making

allegations of abuse. Because of this affirmative conduct, Plaintiffs reason, Juarez was discouraged from reporting additional signs of abuse, and the risk to the children was intensified. After an examination of similar cases in other circuits, this court concludes that Plaintiffs have alleged a constitutional violation by Medina in her instruction to Juarez to stop making allegations of abuse.

In *Dwares v. City of New York*, 985 F.2d 94, 96-97 (2nd Cir. 1993), flag- burning demonstrators alleged that police officers had violated their constitutional rights when the police officers told "skinheads" that they would not interfere if the skinheads assaulted the demonstrators. The Second Circuit concluded that a constitutional violation had been alleged, distinguishing the case from *DeShaney*. *See id.* at 98-99. The court explained that the police officers' affirmative conduct had made the demonstrators more vulnerable to assault, even if the police officers were under no constitutional duty to rescue the demonstrators from an assault. *See id.* at 99.

Freeman v. Ferguson, 911 F.2d 52, 53-54 (8th Cir. 1990), involved a claim that the police chief had directed officers not to respond to a woman's complaints that her estranged husband was violating his restraining order. The estranged husband, a close friend of the police chief, eventually killed his former wife. *See id.* The Eighth Circuit distinguished *DeShaney* and reversed the trial court's dismissal of the claim by the wife's estate against the police chief, noting that the murder was "the result of an affirmative act by a state actor to interfere with the protective services which would have otherwise been available in the community." *Id.* at 54; *cf. Ross v. United States*, 910 F.2d 1422, 1431 (7th Cir. 1990) (allowing recovery

under the Constitution for injury resulting from state prevention of private rescue attempt).

While reiterating the basic holding of *DeShaney* that the government is under no constitutional obligation to rescue private citizens from harm, these cases also illustrate that the state can be liable when it affirmatively places private citizens in harm's way by removing what would otherwise be safety valves. This court has also stated that the state creates danger when it cuts off potential sources of private aid. *See Armijo,* 159 F.3d at 1263 (quoting from *Johnson v. Dallas Ind. Sch. Dist.,* 38 F.3d 198, 201 (5th Cir. 1994)). By discouraging Juarez from reporting additional indications of abuse, Medina increased the children's vulnerability to Vargas' abuse. While Medina certainly was not constitutionally required to rescue the children, her comments to Juarez allegedly discouraged the mother from reporting further evidence of abuse to either the police or CYF, which might then have acted to rescue the children.

That the potential aid Medina's conduct tended to foreclose was from a state source rather than a private source is not constitutionally significant. The Eighth Circuit stated in *Freeman* that a state actor cannot "interfere with the protective services which would have otherwise been available in the community." 911 F.2d at 54. This is precisely what Medina did when she instructed Juarez to stop making allegations of abuse. This court's language in *Armijo* stating that the state can be liable when it cuts off potential sources of private aid does not preclude today's decision that a state actor can also be constitutionally liable when it cuts off potential sources of state aid. Although Medina was constitutionally free to ignore the

pleas of Juarez and offer no assistance, her behavior allegedly discouraged Juarez from seeking the help of other CYF employees or other governmental sources of help such as the police.

Keeping in mind that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," this court agrees with the district court that Plaintiffs have properly alleged a danger creation claim against Medina. *Conley*, 355 U.S. at 45-46. Medina increased the children's vulnerability to Vargas, the first requirement of a danger creation cause of action. Medina's conduct could have put Anthony and Latasha at obvious risk of serious, immediate, and proximate harm, a harm that Medina recklessly and consciously disregarded. Medina's conduct could be conscience shocking, depending on further context as provided by discovery. *See Armijo*, 159 F.3d at 1264. Thus, assuming Plaintiffs will be able to prove that Medina's conduct was a cause of the harm to the children, Plaintiffs have alleged a danger creation constitutional claim against Medina.

4. Gonzales

Plaintiffs allege that Gonzales "knowingly, recklessly, or with deliberate indifference toward and callous disregard for the rights of Latasha and Anthony, failed to instruct, supervise, control, and discipline on a continuing basis Defendants Medina, Doran, and Sentell in their duties so as to refrain from depriving Latasha and Anthony of their constitutional and statutory rights." In

the context of a motion to dismiss, this court agrees with the district court that Plaintiffs have properly alleged that Gonzales, in her role as supervisor, deprived Plaintiffs of their constitutional rights. *See Conley,* 355 U.S. at 45-46.

This court has stated that when "a superior's failure to train amounts to deliberate indifference to the rights of persons with whom his subordinates come into contact, the inadequacy of training may serve as the basis for § 1983 liability." *Sutton,* 173 F.3d at 1240. In addition, as with all substantive due process claims, the supervisor's conduct must shock the conscience. *See id.* at 1241. Plaintiffs claim that Gonzales had knowledge that the alleged unconstitutional behavior by Doran and Medina was occurring. Having knowledge that subordinates are depriving young children of their constitutional rights, Gonzales' failure to correct this conduct amounts to a deliberate indifference to the rights of Anthony and Latasha that could be conscience shocking, depending on context as provided by discovery. Plaintiffs have therefore alleged a constitutional deprivation by Gonzales in her role as supervisor. *See id.* at 1241 (finding supervisor liability when assault was committed by private actor).

D. Clearly Established Law

Once defendants raise the defense of qualified immunity, the plaintiff must demonstrate to the court that the law on which the plaintiff relies was clearly established at the time of the defendants' actions. *See Hilliard v. City & County of Denver,* 930 F.2d 1516, 1518 (10th Cir. 1991). The plaintiff must prove the right was sufficiently clear that a

reasonable official would have understood that his conduct violated the right. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987). "Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Medina*, 960 F.2d at 1498. It is not necessary, however, for plaintiffs to find a case with exact corresponding factual circumstances; defendants are required to make "reasonable applications of the prevailing law to their own circumstances." *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1251 (10th Cir. 1999). In addition, contrary authority from other circuits does not preclude a finding that the law in this circuit was clearly established, if the contrary authority can be distinguished. *See Anaya v. Crossroads Managed Care Sys.*, 195 F.3d 584, 594 (10th Cir. 1999).

1. Doran

In *DeShaney*, the Supreme Court held that state officials could not be liable for failing to protect citizens from private violence. *See DeShaney*, 489 U.S. at 197. The Court was careful to note, however, that the state had played no part in creating the danger or leaving the plaintiff more vulnerable to the danger. *See id.* at 200-01. The clear implication of the Court's language, which was written in 1989, was that a state could be liable when it affirmatively acts to create, or increases a plaintiff's vulnerability to, danger from private violence. Any doubts as to the possible inference to be drawn in this circuit from the Court's language in *DeShaney* were dispelled by the *Medina* case.

In *Medina,* decided in 1992, this court contrasted the social workers in *DeShaney* with police officers who recklessly chased a suspect, noting that the police officers "affirmatively and directly changed the status quo . . . by pursuing an allegedly unconstitutional chase. *DeShaney* is therefore inapplicable." *Medina,* 960 F.2d at 1497 n.5. Other circuit courts also recognized the danger creation theory before Defendants' conduct in question began. *See Reed v. Gardner,* 986 F.2d 1122, 1126 (7th Cir. 1993) (explaining that plaintiffs "may state claims for civil rights violations if they allege state action that creates, or substantially contributes to the creation of, a danger or renders citizens more vulnerable to a danger tha[n] they otherwise would have been"); *Dwares,* 985 F.2d at 99 ("[A]n allegation that the officers in some way had assisted in creating or increasing the danger to the victim would indeed implicate [the victim's due process rights]."); *Gregory v. City of Rogers,* 974 F.2d 1006, 1010 (8th Cir. 1992) (en banc) ("[T]he Due Process Clause imposes a duty on state actors to protect or care for citizens . . . when the state affirmatively places a particular individual in a position of danger the individual would not otherwise have faced."); *L.W. v. Grubbs,* 974 F.2d 119, 121 (9th Cir. 1992) ("The 'danger creation' basis for a claim . . . involves affirmative conduct on the part of the state in placing the plaintiff in danger."); *McComb v. Wambaugh,* 934 F.2d 474, 483 (3rd Cir. 1991) (holding that *DeShaney* prevented recovery because local social workers had not created the danger of private abuse); *Freeman,* 911 F.2d at 55 ("*DeShaney* . . . establishes that the increased danger created in a custodial setting is sufficient to trigger the [Due Process Clause]."). Based on

DeShaney, *Medina*, and the ample case law from other circuits, this court concludes that a reasonable state official would have known in 1993 and 1994 that reckless, conscience shocking conduct that altered the status quo and placed a child at substantial risk of serious, immediate, and proximate harm was unconstitutional.

Our conclusion is supported by *Armijo*. In *Armijo* this court determined that "danger creation jurisprudence was clearly established as a matter of law" by late 1994. *Armijo*, 159 F.3d at 1262. The events prompting this lawsuit began in late April 1993 and continued until May 1994. As the district court correctly noted, the law of danger creation was not so radically altered between the time Defendants in this case acted and the time the defendants in the *Armijo* case acted as to justify a different legal conclusion.[8]

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[8] Our conclusion is not altered to the extent that some of our pre-1995 cases can be interpreted to not require "conscience-shocking" behavior. *Compare Medina*, 960 F.2d at 1496, *with Uhlrig*, 64 F.3d at 574. For one, the "shock the conscience" standard has been traced by this court to the 1992 Supreme Court case of *Collins v. City of Harker Heights Texas*, 503 U.S. 115, 126 (1992). *See Uhlrig*, 64 F.3d at 573. The law is clearly established when there is a Supreme Court case on point. *See Medina*, 960 F.2d at 1498. In addition, the shock the conscience requirement is an *additional* hurdle for plaintiffs attempting to prove liability. Thus, even if Defendants were not aware of the requirement, the constitutional standard they would then have operated on would have been higher. They cannot now claim, therefore, that they were unaware their conduct was illegal because the shock the conscience requirement was not clearly established.

Our conclusion that danger creation law was clearly established at the time of the events underlying this suit is not undermined by the Seventh Circuit's dicta in *K.H. v. Morgan* suggesting that placing a child with a family member might insulate the state from all constitutional liability. *See* 914 F.2d at 852-53. Never before has this court indicated that state employees would be justified in relying on the isolated dicta of another circuit court to create an exception to a general theory of liability established by Tenth Circuit and Supreme Court cases, and it will not do so now. Such a rule would make state employees immune from constitutional obligations determined to exist by this court or the Supreme Court, based on the non-binding musings of other circuit courts.

2. Medina

As the above discussion demonstrates, the danger creation cause of action was clearly established at the time of the events underlying this suit. The circumstances surrounding Doran's involvement with the children resulted in a relatively straight-forward application of the doctrine. The particular theory of danger creation on which Plaintiffs have stated a claim against Medina, however, is substantially less established in the case law. There are no Tenth Circuit cases in which a government official, by her statements discouraging citizens from seeking protection from government officials for harm inflicted by other private citizens, is held to have created danger of private abuse. The closest support for this particular application of the danger creation theory comes from two cases decided by other circuits. *See*

Dwares, 985 F.2d at 94 (2d Cir. 1993); *Freeman*, 911 F.2d at 52 (8th Cir. 1990). These two cases, however, involve circumstances which are not sufficiently analogous to those surrounding Medina's involvement in this case to constitute clearly established law. In *Dwares*, the police officers directly told the citizens committing the violence that they would not interfere with the citizens' assault on other private citizens; Medina made no such statement to Vargas or his fiancee. *See Dwares*, 985 F.2d at 97. In *Freeman*, the police chief directed officers not to respond to a citizen's complaint; Medina made no such statement to her co-workers or to any other government entity which might have responded to Juarez's requests for help. *See Freeman*, 911 F.2d at 53-54.

Plaintiffs can meet their burden to show the law was clearly established by relying on cases from other circuits, but only if "the clearly established weight of authority from other courts . . . have found the law to be as the plaintiff maintains." *Medina*, 960 F.2d at 1498. This standard has not been met in this case. A reasonable official in Medina's position would not have understood that her conduct created a claim under the danger creation theory. Thus, Medina is entitled to qualified immunity.

3. Gonzales

This court has long held that a supervisor may be individually liable when there is "essentially a complete failure to train, or training that is so reckless or grossly negligent that future misconduct is almost inevitable." *Meade v. Grubbs*, 841 F.2d 1512, 1528 (10th Cir. 1988). While Gonzales' alleged failure to train resulted in injury

to Plaintiffs by a private actor, it was also clearly established in 1993 and 1994, as the discussion *supra* demonstrates, that state actors can be liable for private violence when they create the danger or increase the plaintiff's vulnerability to danger.

IV. CONCLUSION

For the reasons stated above, this court **AFFIRMS** the district court's denial of Doran's and Gonzales' motions for summary judgment, and **REVERSES** the district court's denial of Medina's and Sentell's motion for summary judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CHARLES C. CURRIER, as personal representative of the Estate of ANTHONY MICHAEL JUAREZ, deceased, and DEVONNE ESPERANZA JUAREZ, as mother and next fried of LATASHA JUAREZ, a minor,

Plaintiffs,

v.

TOM DORAN, in his personal capacity acting under color of state law; SHIRLEY MEDINA, in her personal capacity acting under color of state law; REGINA SENTELL, in her personal capacity acting under color of state law; MELBA GONZALES, in her personal capacity acting under color of state law; and KELLY ROBBINS, in her personal capacity acting under color of state law,

Defendants.

No. CIV 97-0477 BB/JHG

(Filed Aug. 19, 1999)

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court for consideration of motions for summary judgment filed by Defendants Gonzales and Robbins on April 28, 1998 (Doc. 36), and by Defendants Doran, Medina, and Sentell on January 8, 1999 (Doc. 53). These motions ask the Court to dismiss Plaintiffs' case on grounds of qualified immunity. The

Court previously addressed the qualified-immunity question in *Currier v. Doran*, 23 F.Supp.2d 1277, 1282 (D.N.M. 1998), with respect to Gonzales and Robbins. However, the Court subsequently issued an order withdrawing the qualified-immunity portion of that opinion. The reason for that withdrawal was the fact that counsel for Gonzales and Robbins submitted a brief to this Court raising the qualified-immunity question, but served a brief upon opposing counsel that did not mention qualified immunity. To allow Plaintiffs a fair opportunity to brief the issue, the Court withdrew that portion of the October 21, 1998 *Currier* opinion (*"Currier I"*).

Following the above proceedings, the other Defendants also filed motions for summary judgment raising qualified immunity as a defense. As noted in *Currier I*, however, no discovery has yet taken place in this case due to a stay imposed by the Court, and the motions for summary judgment are more properly addressed as motions to dismiss. All parties have now had an opportunity to brief the issue, and the Court will address the qualified- immunity question with respect to each Defendant. The Court will not repeat the facts and procedural history outlined in *Currier I*.

Danger-Creation Theory as Clearly Established Law

In *Currier I*, this Court held the danger-creation theory had not, as of late 1993, been developed to the point that a reasonable state employee would recognize children had a constitutional right not to be knowingly placed with an abusive natural parent. 23 F.Supp.2d at 123. This Court relied on the fact that no case had yet

been decided establishing such a right. In addition, as the Court pointed out, there was dicta from two Circuits indicating that placement of a child with a parent or family member might insulate a state from constitutional liability. *Id.* Since *Currier I* was filed, however, the Court has had the benefit of argument and authority from both sides. In addition, the Tenth Circuit has issued two opinions concerning the danger-creation theory, both of which are more expansive, regarding the scope of that theory as well as the clearly-established nature of the theory, than the approach taken by this Court in *Currier I*. *See Sutton v. Utah State School for the Deaf and Blind*, 173 F.3d 1226 (10th Cir. 1999); *Armijo v. Wagon Mound Pub. Sch.*, 159 F.3d 1253 (10th Cir. 1998).

In *Armijo*, the Tenth Circuit extensively discussed the danger-creation theory and set out a six-part test for determining whether the theory might be viable in a particular case. 159 F.3d at 1262-63. Under *Armijo* a plaintiff must show: (1) he or she was a member of a limited and specifically definable group; (2) the defendant's conduct put the plaintiff at a substantial risk of serious, immediate, and proximate harm; (3) the risk was obvious or known; (4) the defendant acted recklessly in conscious disregard of that risk; (5) such conduct, when viewed in total, is conscience-shocking; and (6) the defendant either created the danger or increased the plaintiff's vulnerability to it in some way. *Id.* Applied to the facts of this case, the *Armijo* analysis confirms the Court's determination, in *Currier I*, that Plaintiffs have alleged a viable danger-creation cause of action under the due-process clause. Plaintiffs, as specific children placed in a specific

home by Defendants,[1] are members of a limited group. Also, Plaintiffs allege specific facts showing that Defendants' conduct placed them at substantial risk of serious harm, that the risk was obvious or known, that Defendants acted recklessly in disregard of that risk, and that Defendants' conduct is conscience-shocking.[2] Finally,

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[1] At this point in the opinion, the Court will refer to Defendants collectively. The Court will discuss the facts alleged as to each individual Defendant *infra*.

[2] These allegations, which must be accepted as true for purposes of the qualified-immunity analysis, may be summarized as follows: (1) Defendants removed the children from their mother's home, knew their father was not supporting them financially, and knew he had allowed them to live in a home where they were being neglected; (2) despite this knowledge, Defendants placed the children in their father's physical custody; (3) following that placement, Defendants received information indicating the father and/or his girlfriend were physically abusing the children, but failed to investigate the allegations or to report them to the children's court, which awarded legal and physical custody to the father; (4) shortly thereafter, Defendants received more information alleging abuse of the children, and removed the children temporarily from the father's home; (5) Defendants failed to adequately investigate the allegations and returned the children to the father; (6) Less than two months later, Defendants again were notified of allegations of abuse, failed to properly investigate them, and actively discouraged the children's mother from reporting any more such allegations; and (7) shortly before Anthony was killed by his father, Defendants again received allegations of abuse, found bruises on both children, but failed to take any action to protect them or remove them from their father's home, with the result that Anthony was scalded to death and, when both children were finally removed from the home, they were both covered with bruises.

Plaintiffs allege Defendants created or increased the danger to which they were exposed, by knowingly or recklessly failing to prevent the children's father from obtaining legal and physical custody after first removing the children from their mother's home, and then changing the status quo by placing the children with their father. *See S.S. v. McMullen*, ___ F.3d ___, 1999 WL 512176 (8th Cir.) (transferring custody to father, knowing of high risk that sexual abuse by third party would result, created danger and concomitant duty to protect from that danger).

In addition, both *Armijo* and *Sutton* are highly relevant to the requirement that the law be clearly established at the time of the actions in question. In *Sutton* the Tenth Circuit stated that a plaintiff "need not present an identical case to show the law was clearly established" but must show only that the contours of the right were sufficiently clear that a reasonable official would understand he was violating that right. 173 F.3d at 1241. Significantly, both *Sutton* and *Armijo* involved fact situations for which there was no directly applicable precedent. In both cases, however, the Tenth Circuit held that the general outlines of the danger-creation theory were clearly established in 1995 and 1994, respectively, and therefore the state actors in these cases were not entitled to qualified immunity. *Id.;* 159 F.3d at 1262. The actions taken by the school personnel in *Armijo* occurred less than a year after most of the actions of Defendants in this case. Furthermore, *Armijo* relies on cases from other jurisdictions decided from 1990 to 1994, a time frame encompassing the 1993-1994 span involved in this case. Finally, there appear to have been no major changes in the law of

danger-creation between late 1993, the time Defendants began to act, and late 1994, when the *Armijo* defendants acted, which would justify a different result in this case than in *Armijo*. Therefore, the Court will follow *Armijo* and hold there was clearly established law, at the time period relevant to this case, that state actors could not place a child in a dangerous circumstances and then fail to protect that child.

The Court's opinion in *Currier I*, in deciding there was no clearly established law in 1993 and 1994 governing Defendants' actions in this case, relied on two main factors. First, there was no case law directly on point involving a transfer of custody from one natural parent to another. Second, as noted above, there was dicta from other Circuits implying a state could not be held liable for placing a child with a parent or family member. The Court's focus therefore was narrowed to the particular circumstances of child-custody decisions involving natural parents. However, the *Armijo* and *Sutton* opinions encourage a broader focus, aimed at the danger-creation theory in general, rather than the particular factual circumstance of each case. *Cf. Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (proper application of clearly-established-right standard depends on proper determination of level of generality to use in deciding what right is involved). In addition, other Circuits have noted that, in qualified immunity cases, dicta is "particularly unhelpful" because courts will often reach a different result after an issue has been briefed, argued, and thoroughly researched. *See, e.g., Hamilton v. Cannon*, 80 F.3d 1525, 1530 (11th Cir. 1996); *see also Wilson v. Meeks*, 52 F.3d 1547, 1555 (10th Cir. 1995) (one ambiguous bit of dictum in a Ninth Circuit opinion

cannot form the basis for a clearly established duty). A state employee in 1993 and 1994, then, faced with a decision concerning custody of a child and a natural parent, would have confronted a legal landscape consisting of the clearly-established principle that a child or other person could not constitutionally be placed in harm's way and then abandoned. Conflicting with this danger-creation theory in this particular fact situation were two or three statements by Circuit courts that were clearly dicta. The Court holds that if such an employee knowingly or recklessly transferred custody of a child to an abusive parent, the employee could not reasonably believe the danger-creation theory was inapplicable, simply because the abuser was a parent.

Allegations as to Individual Defendants

There are five individual Defendants in this case. None of them were involved in every alleged wrongful act committed in the case. It is necessary, therefore, to examine the allegations as to each individual Defendant to determine whether they meet the requirements of the *Armijo* and *Sutton* cases.[3]

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[3] In doing so, the Court notes Defendants' argument that only actions taken prior to October 19, 1993 may be considered. According to Defendants, it is undisputed that legal and physical custody of the children was granted to their father at least by that date, and therefore they cannot be held liable for injuries inflicted on the children after October 19. *See DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 201-202 (1989) (returning child to father's custody did not impose continuing duty to protect child from father's abuse). The Court disagrees. In this case, unlike *DeShaney*, Defendants did not

Defendant Doran: The allegations against Doran are as follows: he was told about allegations of physical abuse in August and September 1993, but failed to investigate these allegations even though he knew of the father's history as an irresponsible non-custodial parent. In October, shortly after legal custody was granted to the father, Doran was again told about bruises on Latasha's back, but performed only a cursory investigation, believed the father's explanation for the bruises despite the prior reports of abuse, and did nothing. Shortly thereafter, in November, Doran received another report of abuse, and investigated bite marks and bruises found on both Latasha and Anthony. The children were removed from their father's custody, but were returned after Doran failed to strongly advocate against that course of action in a meeting with his department's attorney, despite his alleged belief the children would be injured again if returned to their father. In January 1994, Doran again became aware of abuse allegations raised by the children's mother, but his response was to discount the

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merely return the children to the same situation in which they were found. Instead, Defendants changed the status quo and thereby created the danger faced by the children. In such circumstances, the state does have a duty to protect the children from the harm to which they were knowingly or recklessly exposed, even after legal custody has been granted to a parent. *See S.S. v. McMullen, supra,* ___ F.3d at ___ (state actors have an obligation to subsequently protect an individual after they have created a danger to the individual's well-being; fact that legal custody had already been granted to child's father did not insulate defendants from liability when child was sexually abused after defendants knowingly exposed child to risk of such abuse by transferring custody to father).

reports and attempt to discourage the mother from making any further allegations of abuse. Finally, in March, Doran was once again informed of allegations of abuse. Instead of taking action based on his past knowledge of the case and the almost-monthly instances of bruising, bites, and other indications of abuse, Doran simply referred the matter to another employee for handling. The Court holds these allegations are sufficient to state a claim under the danger-causation theory, especially at this stage of the case when no discovery has been performed. The Court cannot say Plaintiffs would be unable to recover damages from Doran under any set of facts alleged in the complaint. Therefore, the motion for summary judgment filed by Doran will be denied.

Defendant Medina: Medina was involved in the initial removal of the children from their mother's custody, and the initial placement of the children with their father. She reported to the children's court that the father had allowed the children to live in alarming conditions, and was not supporting the children. She then apparently had no direct involvement in the matter until January 1994, when she investigated a report of abuse. Although she discovered bruises on Anthony's buttocks, she did nothing to protect the children. Instead, she also sought to dissuade the mother from making any further accusations of abuse. This is a closer call than the case against Doran, because there are fewer allegations indicating Medina had knowledge of the numerous complaints of abuse made against the father. However, the Court believes Plaintiffs have alleged sufficient facts to be allowed discovery to determine how much knowledge Medina actually had before she failed to act in January and, in fact,

actively discouraged any further attempts by the mother to notify authorities of the alleged on-going abuse being perpetrated by the father. Therefore, Medina's motion for summary judgment will be denied as well.

Defendant Sentell: Defendant Sentell took part in two incidents involving the children. She fielded the January allegation of abuse and referred the matter to Medina for investigation. Then, in March, Doran referred another allegation of abuse to her. She investigated and discovered bruises on both children. Despite her knowledge that a similar complaint had been received only two months previously, she concluded the bruises were not the result of abuse. Again, as with Medina, this is a much closer case than the alleged wrongdoing by Doran. It is possible the most Plaintiffs can show with respect to Sentell is ordinary negligence, which is not sufficient to make out a due-process violation. Again, however, at this stage, it is not clear how much knowledge Sentell had concerning the history of the case and the number and extent of the abuse complaints against the father. Furthermore, it is not clear how much bruising she observed in March, and how apparent it should have been that the children were being abused. Therefore, the Court will deny Sentell's motion for summary judgment and allow discovery with respect to this Defendant as well.

Defendant Gonzales: Gonzales' only direct involvement in the case was at a meeting in November, when she concluded, on the basis of Doran's report, there was no basis for the department to retain physical custody of the children. She was allegedly aware of the bite marks on both children and of previous reports of bruises on both children. The main allegation Plaintiffs make against

Gonzales is with respect to her status as a supervisor. They maintain she exhibited deliberate indifference in supervising the employees who actually worked on the case. The *Sutton* opinion also involved an allegation of supervisory liability, for failure to train and failure to implement a policy protecting against sexual assault. In *Sutton*, the supervisor had actual knowledge of complaints that a particular student had been repeatedly sexually molested in the bathroom. 173 F.3d at 1240-41. The supervisor (a principal) failed to take any action to train his employees or establish a policy for action that might prevent such assaults. *Id.* Under these facts, as alleged, the Tenth Circuit determined a cause of action had been stated against the principal under a combined theory of danger-creation and supervisory liability. *Id.* In the case before the Court, it is alleged Gonzales knew of a history of abuse allegations, and that both children had bite marks on their bodies. She had direct involvement in one instance of failure to protect the children. It is not clear whether any of the subsequent allegations of abuse were brought to her attention, or whether she had any further knowledge of the case. Again, this is a close call, but the Court will allow the action against Gonzales to proceed, at least to the summary-judgment stage. Given the stay of discovery that has been imposed in this case, it would not be fair to require the Plaintiffs to assert more facts than they have been able to allege at this point.

Defendant Robbins: The only allegation with respect to Robbins is that she received a letter written October 20, 1993, asking for an investigation of potential abuse by the father. Such an investigation was performed by Doran, and there is no hint in the complaint of any further

involvement in the case by Robbins. Unlike with the other Defendants, there is no indication of possible knowledge or involvement in a continuing series of complaints of abuse, following the placement of the children with the father. Furthermore, the allegations of the complaint establish that the one time Robbins was informed of possible abuse, an investigation ensued (although it is not clear whose directive impelled the investigation). The complaint fails to allege any facts indicating the possibility of conduct by Robbins that might constitute a dereliction of duty, or that shock the Court's conscience. Therefore, the Court will grant her motion for summary judgment.

ORDER

For the above stated reasons, the Court hereby DENIES the motion for summary judgment filed by Defendants Doran, Medina, and Sentell (Doc. 53), DENIES the motion for summary judgment filed by Defendant Gonzales (Doc. 36), and GRANTS the motion for summary judgment filed by Defendant Robbins (Doc. 36).

Dated this 19th day of August, 1999.

/s/ Bruce D. Black
BRUCE D. BLACK
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CHARLES C. CURRIER, as personal representative of the Estate of ANTHONY MICHAEL JUAREZ, deceased, and DEVONNE ESPERANZA JUAREZ, as mother and next fried of LATASHA JUAREZ, a minor,

Plaintiffs,

v.

TOM DORAN, in his personal capacity acting under color of state law; SHIRLEY MEDINA, in her personal capacity acting under color of state law; REGINA SENTELL, in her personal capacity acting under color of state law; MELBA GONZALES, in her personal capacity acting under color of state law; and KELLY ROBBINS, in her personal capacity acting under color of state law,

Defendants.

No. CIV 97-0477 BB/JHG

(Filed Oct. 21, 1998)

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on a motion for summary judgment filed by Defendants Doran and Medina on April 16, 1998 (Doc. 28), as well as a motion for summary judgment filed by Defendants Gonzales and Robbins on April 28, 1998 (Doc. 36). Having considered the submissions of the parties and the applicable law, the

Court will DENY the Doran/Medina motion, and GRANT the Gonzales/Robbins motion.

Facts and Procedural History

This case arises out of the tragic death of Anthony Juarez, who was three years old at the time he died. Plaintiffs' lawsuit alleges Defendants deprived Anthony[1] of his right to substantive due process by removing him from his mother's custody and allowing his father to obtain custody. Anthony's father subsequently killed him by scalding him with boiling water.

Defendants' involvement with Anthony began when Defendant Medina, acting on a report of child abuse or neglect, visited a home and found a five-year-old boy in charge of a four-year-old, a three-year-old, a two-year-old, and two three-month-old babies, with no adult present. The children were taken into state custody and, after the state filed an abuse-and-neglect petition, legal and physical custody of Anthony was given to the state in an ex parte court order. Up to that time Anthony had been in the physical and legal custody of his mother, although she had left Anthony in the "care" of another person and was living in California when the state stepped in. One week later, on May 10, 1993, the state district court held a

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[1] For ease of reference, this opinion refers only to Anthony, although his sister Latasha Juarez was similarly situated throughout the circumstances discussed in the opinion, and is claiming damages (through her mother) for the same causes of action asserted by Anthony's estate. All factual and legal discussions in this opinion, as well as the holding, apply equally to Latasha's claims and Anthony's claims.

custody hearing, gave physical custody of Anthony to his natural father, and kept legal custody with the state. Several further custody hearings were held during the summer and early autumn. During this same time period, Anthony's mother returned from California and began making accusations that Anthony was being physically abused while in his father's care.

The parties hotly dispute what occurred during the hearings held over the summer and in October. Defendants contend legal and physical custody of Anthony was given to his father in June; Plaintiffs contend that did not happen until October 19. At this juncture, due to the procedural posture of the case, it is not necessary for the Court to decide exactly when Anthony's father was awarded both legal and physical custody.

In November, the state took temporary custody of Anthony again, after reports that bruises had been found on his body. However, three days later custody was returned to his father, because the state did not file an abuse-and-neglect petition. Over the next several months the state received other reports indicating Anthony was being abused while in his father's household, but did not act to remove Anthony. Finally, on April 14, 1994, Anthony's father poured boiling water on him, causing severe burns which ultimately resulted in his death. The father pled guilty to child abuse resulting in death and is serving an eighteen-year prison term.

Anthony's estate has filed this lawsuit seeking, among other claims, damages under 42 U.S.C. § 1983 for violation of Anthony's civil rights. The procedural posture of this case is somewhat unusual because at this

point, discovery in the case has been limited to the question of whether Anthony was in the state's custody, either legal or physical, at the time he was killed. No discovery has been conducted concerning the merits of Anthony's claims. Following completion of this limited discovery, Defendants Doran and Medina have moved for summary judgment on a narrow legal issue. They maintain Anthony was in his father's custody when he was killed, and that under *DeShaney* they are absolved of any liability for his death as a matter of law. Defendants Gonzales and Robbins have also moved for summary judgment, raising the same argument. In addition, however, Gonzales and Robbins maintain they violated no clearly established law and are therefore entitled to qualified immunity.

Discussion

A. Doran and Medina Motion

The only question to be answered with respect to this motion is whether, as a matter of law, Defendants may not be held liable in this action simply because Anthony was not in the state's custody at the time he was killed. Discovery has revealed that beginning in October 1993, except for the brief period of state temporary custody in November, Anthony was in his father's legal as well as physical custody, and remained so until the incident that caused his death.[2] Defendants argue that this fact alone

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[2] Plaintiffs have mentioned the existence of a custody order, entered in February 1994, which purports to order that custody of Anthony "remain" with the state. It is apparent that this order actually concerns Anthony and Latasha's half-

precludes any possibility they could be liable for a violation of Anthony's right to substantive due process, under the authority of *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989). Plaintiffs, on the other hand, argue that under *DeShaney*, the mere fact that a child is in the custody of one of his natural parents does not automatically insulate the state from a constitutional claim arising out of the abuse of that child.

In *DeShaney* the Supreme Court held that generally, governmental agencies have no constitutional duty to protect a citizen from acts of violence committed by private individuals. 489 U.S. at 195-97. This is so even if the victim is a child who had previously been granted temporary protection from his parents' abuse, when the state took the child into temporary custody. Returning that child to his father's custody, to the same situation he had been in before the state acted, did not constitute a violation of the child's right to substantive due process. 489 U.S. at 201-02. The question in this case is somewhat different, because Anthony was not originally in his father's custody. Instead, he was removed from one custody situation and placed with his father by the state. The Court finds this a significant difference from *DeShaney*, and one possibly (depending on the facts Plaintiffs might prove) warranting a different result.

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brother, Jacob, who has a different father and who, fortunately for him, was not turned over to Anthony's father by the state. Plaintiffs do not seriously contend that this order actually applies to Anthony, and the Court therefore finds that the order does not raise a genuine issue of material fact regarding Anthony's custody situation at the time he was scalded.

The Tenth Circuit has recognized two exceptions to the general *DeShaney* rule that the state is not constitutionally liable for violence committed by private individuals. These exceptions are the special-relationship doctrine and the danger-creation theory. *Uhlrig v. Harder*, 64 F.3d 567, 572 (10th Cir. 1995). The special-relationship doctrine is applicable when the victim of the violence is somehow under the state's control, such as inmates of a prison or people involuntarily committed to a mental institution. *Id.* This doctrine also applies to children who are in the state's legal custody and have been placed in a foster home or institution. *Yvonne L. v. New Mexico Dep't of Human Servs.*, 959 F.2d 883, 893 (10th Cir. 1992). In this case, however, the doctrine is inapplicable because Anthony was not in state custody, either legal or physical, at the time he was killed by his father. The state had relinquished all right to assert authority over Anthony (barring a new abuse or neglect petition), and had completely turned over to his father the responsibility of caring for Anthony's needs. The fact that the state had previously assumed custody of Anthony did not create a special relationship lasting beyond the time the state gave up its control over his life. *See DeShaney*, 489 U.S. at 201 (state does not become permanent guarantor of individual's safety by having once offered him shelter).

The other possible exception to the *DeShaney* rule, the danger-creation theory, applies when the state has created the danger of attack or mistreatment by private individuals, or has rendered a person more vulnerable to such conduct. *Uhlrig*, 64 F.3d at 572. This theory might apply to the present case based on the involvement of the state in awarding custody. Anthony was in his mother's

physical and legal custody when the state removed him from that position, took responsibility for his safety and well-being, and deposited him with his father, who had never had custody or control over Anthony and who ultimately killed him. If the state's conduct, given the information it had, was egregious enough to shock one's conscience, a viable substantive-due-process claim might be present. *See Uhlrig* (claim under danger-creation theory must involve state action that shocks the conscience).

Courts addressing similar situations and legal arguments have not been uniform in their response. Some courts have stated, or at least suggested, that if a natural parent or other family member has been given physical custody of a child, the state's responsibility is at an end and no civil-rights claim can result if the natural parent abuses the child. *See K.H. v. Morgan*, 914 F.2d 846, 852 (7th Cir. 1990) (noting there is a difference between placing a child with a member of her family and placing the child with a foster parent); *Weller v. Dep't of Social Servs. for the City of Baltimore*, 901 F.2d 387, 392 (4th Cir. 1990) (state had no duty to protect child from mother and grandmother, even though state had transferred custody from father to mother); *cf. McComb v. Wambaugh*, 934 F.2d 474, 483 (3d Cir. 1991) (no violation of equal protection where law treats children returned to parent differently than children in foster care). However, the courts writing these opinions were not directly faced with a situation in which the state, having information that the natural parent's home would be dangerous to the child, proceeded to allow that parent (who had not, to that point, had custody of the child) to take legal and physical custody of the child from the state. The only two cases the Court

could locate that addressed such a situation have held that, given this fact pattern, the danger-creation exception to the *DeShaney* rule should be applied.

The facts of *Ford v. Johnson*, 899 F.Supp. 227 (W.D.Pa. 1995), are almost identical to the facts in this case. In *Ford*, a two-year-old girl was beaten to death by her natural father. She had been placed in the custody of her father after an investigation by the state, which had previously had custody of the child. The plaintiff in *Ford* maintained that a cause of action existed under both the special-relationship theory and the danger-creation theory. Although the district court rejected the special- relationship argument, the court held that plaintiff's danger-creation claim against the state was not barred simply because the child had been placed with a parent rather than a foster parent. 899 F.Supp. at 233. Instead, the court allowed the latter claim to proceed because the child had previously been in the custody of the state and the plaintiff alleged the state's investigation of the father, prior to allowing him to assume custody of the child, was so insufficient as to rise to the level of a constitutional violation. *Id.*

Similarly, in *Tazioly v. City of Philadelphia*, 1998 WL 633747 (E.D.Pa.), the court was faced with a situation in which the state terminated a satisfactory foster care situation and placed the child in the custody of a biological mother with known propensities for violent and bizarre behavior. The court held that under the danger-creation theory, the state might be liable under § 1983 for the resulting abuse of the child, committed by the biological mother. The *Tazioly* court distinguished *DeShaney* because the child in *DeShaney* had only been in the state's custody

temporarily, and had been returned to the natural father because there was insufficient evidence of abuse. In *Tazioly*, on the other hand, the child had been in foster care, in the state's legal custody, for almost two years, and the plaintiff had alleged the state had actual knowledge the biological mother was an unfit parent and dangerous.

The Court finds there is a significant difference between the situation in *DeShaney* and the situation in this case, and agrees with the *Ford* and *Tazioly* opinions concerning the legal impact of that difference. In *DeShaney*, the state did not disturb the status quo. The child was in his father's custody; the state took temporary custody of the child; and the child was then returned to his father's custody. In this case, on the other hand, Anthony was removed from one custodial situation and taken into the state's care and custody. The state accordingly had a duty not to consign Anthony to another dangerous home situation. This duty is not affected by the fact that Anthony was placed with a biological parent who had not previously had custody. Once the state acts to disturb the current custodial situation and assumes control over a child's life, the state may not create a dangerous condition for the child by knowingly or recklessly turning control of the child over to an abusive person, even if that person is a parent or other family member.[3] If Plaintiffs can prove Defendants had sufficient

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[3] Where a party requesting custody of a child is a parent, who by law may have certain rights concerning the child's custody, there are of course countervailing factors to consider in deciding whether a constitutional violation occurred when the child was placed with that parent. *See K.H.*, 914 F.2d at 853 (court does not want to put child welfare workers on razor's

information indicating Anthony's father was dangerous, before the state relinquished custody,[4] Plaintiffs may be able to make out a claim for violation of Anthony's right to substantive due process. *See Yvonne L.*, 959 F.2d at 894 (standard for constitutional liability for placement of child is abdication of the duty to act professionally in making the placement). Therefore, the motion for summary judgment filed by Defendants Doran and Medina will be denied.[5]

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edge-damned if they return child to its family and abuse subsequently occurs, and damned if they do not do so and family sues for violation of its constitutional right to familial association). In the Court's view, however, these countervailing factors are relevant to the merits of the constitutional claim, rather than to the initial question of the existence of a duty. The Court does not accept the bright line discussed in *K.H.*, between placement of a child with a family member and placement with someone else. In fact, it does not appear the Seventh Circuit interprets *K.H.* in that manner. In a later case, Judge Posner (who wrote *K.H.*) stated, in dictum, that if the state's employees knowingly placed the child in a position of danger, by taking her to her father's house in violation of a court order, the employees would not be shielded from liability by the *DeShaney* opinion. *Bank of Illinois v. Over*, 65 F.3d 76 (7th Cir. 1995).

[4] The Court recognizes there is a factual dispute concerning when, exactly, Anthony's father obtained both legal and physical custody over Anthony. Questions of what information Defendants had, and at what point in the proceedings, are relevant to the question of their liability. However, such questions are not ripe for resolution at this time, given the limited nature of the issue facing the Court.

[5] The Court notes these Defendants have argued the facts of this case do not establish a cause of action under the danger-creation doctrine. At this stage of the proceedings, the only issue before the Court is the legal issue discussed in the opinion. After Plaintiffs have had an opportunity to conduct discovery

B. Gonzales and Robbins Motion for Summary Judgment

As pointed out above, Defendants Gonzales and Robbins, in addition to adopting the argument made by Doran and Medina, contend they are entitled to qualified immunity. Given the limited discovery that has occurred in this case, addressing the claim of qualified immunity at this point is tantamount to addressing such a motion at the Fed.R.Civ.P. 12(b)(6) stage. Any other approach would be unfair, since Plaintiffs have not yet had an opportunity to develop facts concerning the merits of their lawsuit. When a qualified immunity defense is raised in a motion to dismiss, the plaintiff assumes the burden of showing the defendant violated clearly established law. *Breidenbach v. Bolish*, 126 F.3d 1288, 1291 (10th Cir. 1997). The plaintiff must identify a clearly established statutory or constitutional right of which a reasonable person would have known, and allege facts to show the defendant's conduct violated that right. *Id.* In doing so, the plaintiff must meet the heightened pleading standard applicable in qualified-immunity cases. *Id.*, 126 F.3d at 1292.

As discussed in the preceding section, Plaintiffs have established the existence of a constitutional right in this case – Anthony's right not to be placed in a dangerous home due to Defendants' abdication of their duty to act professionally in making the placement, even if the home is that of a natural parent. In addition, Plaintiffs' complaint alleges sufficient facts to establish a violation of

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directed toward the merits of the action, the question of the existence of a valid cause of action, under the facts discovered, will be ripe for adjudication.

that right, by reciting a number of alleged facts that, if proved, arguably show state action that constitutes abdication of professional duty and shocks the conscience. The only question remaining for the Court is a determination as to whether Anthony's constitutional right was clearly established at the time Defendants acted as they did. The Court holds that such a right was not so established.

In order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clear weight of authority from other courts must have found the law to be as the plaintiff maintains. *Dill v. City of Edmond*, ___ F.3d ___, 1998 WL 546131, *6 (10th Cir.). The law must have been clearly established at the time of the defendants' actions, rather than at the present. *Id.*, at *16 (noting that a Tenth Circuit decision subsequent to the events that led to the lawsuit did not provide clearly established law). Defendants' actions in this case took place during 1993 and early 1994. It is therefore necessary to examine the cases applying *DeShaney* prior to that time, to determine whether there was clearly established law holding the state could be liable if it placed a child with a natural parent.

Both the *Ford* and *Tazioly* opinions are district court opinions, and were published and issued in 1995 and 1998, respectively. Therefore, neither opinion can serve as the basis for a finding that the law was clearly established in 1993 or 1994. In the Tenth Circuit, the *Yvonne L.* case was decided in 1992, which falls within the appropriate time frame. However, that case contains language indicating its scope is limited to situations in which the child remains in the state's custody and is placed in a foster

home or institution. *See, e.g.*, 959 F.2d at 891 and 893 (citing *DeShaney* for the proposition that the state has no affirmative duty to protect a child who is in his parents' custody; holding that children in the custody of the state have a constitutional right to be reasonably safe from harm). In the other Circuits, as noted above, there was dicta in two 1990 cases indicating the states might be automatically free from liability if an abused child was in the custody of a parent or family member. *K.H.; Weller.* The *DeShaney* opinion itself reads quite broadly, setting out its general rule that a state is not constitutionally liable for violence committed by private individuals and then limiting that rule only with specific examples in which the child is in some way under the state's physical and legal control. In addition, *DeShaney* focused on the fact that the child's injuries had been caused by his natural father, who was in no sense a state actor. 489 U.S. at 189.

It is true that since *DeShaney* other courts have developed the danger-creation theory as an additional exception to the *DeShaney* rule, and one not limited to situations in which the child remains in state custody. However, as of 1993 and early 1994 this danger-creation exception to *DeShaney*'s general rule had not been developed by the courts to the point that a reasonable state employee would recognize children had a constitutional right not to be placed with an abusive natural parent. Therefore, Defendants Gonzales and Robbins are entitled to qualified immunity in this case. *See Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992) (law not clearly established where almost all cases establishing the law were decided after events forming the basis of the

lawsuit). Their motion for summary judgment will be granted on this basis.

Conclusion

Based on the foregoing, the motion for summary judgment filed by Defendants Doran and Medina will be denied, and the motion for summary judgment filed by Defendants Gonzales and Robbins will be granted. Since other claims remain pending in this lawsuit, this decision does not terminate the litigation as to any Defendant.

ORDER

For the above stated reasons, the Court hereby DENIES the motion for summary judgment filed by Defendants Doran and Medina (Doc. 28), and GRANTS the motion for summary judgment filed by Defendants Gonzales and Robbins (Doc. 36).

Dated at Albuquerque this 20th day of October, 1998.

/s/ Bruce D. Black
BRUCE D. BLACK
United States District Judge

Counsel for Plaintiffs:
William S. Dixon
Charles K. Purcell
Rodey, Dickason, Sloan, Akin & Robb, P.A.
P.O. Box 1888
Albuquerque, New Mexico 87103

Michael L. Stout
Stout & Winterbottom
215 West Sixth Street
Roswell, New Mexico 88201

Counsel for Defendants Doran and Medina:
Timothy V. Flynn-O'Brien
Bryan and Flynn-O'Brien
500 Copper N.W. #102
Albuquerque, New Mexico 87102

Counsel for Defendants Gonzales and Robbins:
Paula I. Forney
State of New Mexico RMD-Legal Bureau
P.O. Drawer 26110
Santa Fe, New Mexico 87502

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CHARLES C. CURRIER, as personal representative of the Estate of ANTHONY MICHAEL JUAREZ, deceased, and DEVONNE ESPERANZA JUAREZ, as mother and next friend of LATASHA JUAREZ, a minor,

Plaintiffs,

v. No. 97-477 BB/JHG

TOM DORAN, in his personal capacity acting under color of state law; SHIRLEY MEDINA, in her personal capacity acting under color of state law; REGINA SENTELL, in her personal capacity acting under color of state law; MELBA GONZALES, in her personal capacity acting under color of state law; and KELLY ROBBINS, in her personal capacity acting under color of state law,

Defendants.

ORDER

(Filed Nov. 25, 1998)

THIS MATTER having come before the Court on Plaintiffs' October 28, 1998 Motion to Vacate Summary Judgment and Impose Sanctions, and the Court having read the submissions of counsel and being otherwise fully informed in the premises, reserves ruling on the request for sanctions but

FINDS that the motion is well taken insofar as it requests that the Court should vacate all portions of its October 21, 1998 Memorandum Opinion and Order that grant summary judgment to Defendants Gonzales and Robbins or that otherwise address their arguments on qualified immunity; and the Court further

FINDS that Plaintiffs should be afforded additional time in which to respond to the motion for summary judgment served by Defendants Doran, Medina, and Sentell on October 27, 1998, and the motion for summary judgment served by Defendants Gonzales and Robbins on October 29, 1998.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that all portions of the Court's October 21, 1998 Memorandum Opinion and Order that grant summary judgment to Defendants Gonzales and Robbins or that otherwise address issues of qualified immunity are hereby vacated; and it is further

ORDERED, ADJUDGED, AND DECREED that Plaintiffs shall have fourteen days from the entry of this order in which to respond to the motions for summary judgment served on October 27, 1998 by Defendants Doran, Medina, and Sentell, and on October 29, 1998 by Defendants Gonzales and Robbins.

/s/ Bruce D. Black
HONORABLE
BRUCE D. BLACK
UNITED STATES
DISTRICT JUDGE

Submitted by:

/s/ K. Purcell
William S. Dixon
Charles K. Purcell
Attorneys for Plaintiffs

Approved as to form:

(Telephonically approved 11/10/98)
Timothy V. Flynn-O'Brien
Attorney for Defendants Doran, Medina, and Sentell

(Telephonically approved 11/10/98)
Paula I. Forney
Attorney for Defendants Gonzales and Robbins

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

CHARLES C. CURRIER, as personal representative of the Estate of **ANTHONY MICHAEL JUAREZ**, deceased, and **DEVONNE ESPERANZA JUAREZ**, as mother and next friend of **LATASHA JUAREZ**, a minor,

Plaintiffs,

v.

NO. 97-477 BB/JHG

(FILED OCT. 31, 1997)

TOM DORAN, in his personal capacity acting under color of state law; **SHIRLEY MEDINA**, in her personal capacity acting under color of state law; **MELBA GONZALES**, in her personal capacity acting under color of state law; and **KELLY ROBBINS**, in her personal capacity acting under color of state law.

Defendants.

SCHEDULING ORDER RE: PRELIMINARY ISSUE

THIS MATTER came before Joe H. Galvan, United States Magistrate Judge for scheduling conference pursuant to **Fed.R.Civ.P. 16** on September 30, 1997. The attorneys are to submit this Scheduling Order directly to Joe

H. Galvan, United States Magistrate Judge, 200 E. Griggs Ave., Las Cruces, NM 88001 by October 15, 1997.

IT IS HEREBY ORDERED that the parties shall adhere to the following as to the preliminary issue of the legal custody and exercise of control over Anthony Juarez and Latasha Juarez through April 16, 1994:

The termination date for discovery on this issue is **January 2, 1998**, and discovery shall not be reopened, except by an order of the Court upon a showing of good cause. This deadline shall be construed to require that discovery on this issue be **completed** before the above date. Service of interrogatories or requests for production shall be considered timely only if the responses are due prior to the deadline. A notice to take deposition shall be considered timely only if the deposition takes place prior to the deadline. The pendency of dispositive motions shall not stay discovery.

MOTIONS ON DISCOVERY

Motions relating to discovery as to the preliminary issue (including but not limited to motions to compel and motions for protective order) shall be served no later than **January 2, 1998**. This deadline shall not be construed to extend the twenty-day time limit imposed by **D.N.M.LR-Civ. 26.6, and 37.**

DISCOVERY LIMITATIONS

Discovery shall be limited to the preliminary issue stated above (legal custody and the exercise of control

over Anthony Juarez and Latasha Juarez through April 16, 1994.

A maximum of **10** interrogatories by each adverse party to any other adverse party are permitted.

A maximum of **10** requests for admission by each adverse party to any other adverse party are permitted.

A maximum of **10** requests for production by each adverse party to any other adverse party are permitted.

A maximum of **5** depositions by each adverse party are permitted. Each deposition is limited to a maximum of **4** hours, unless extended by agreement of the parties.

Supplementation under **Fed.R.Civ.P. 26(e)** is due 30 days after the party acquires the information.

EXPERT WITNESSES

Deadline for parties to comply with **Fed.R.Civ.P. 26(a)(2)** shall be determined at a later date.

JOINDER AND AMENDMENT

Plaintiffs shall be permitted until **December 1, 1997** to join additional parties.

All other parties shall be permitted until **December 1, 1997** to join additional parties.

OTHER PRETRIAL MOTIONS

Pretrial motions, as to the preliminary issue other than discovery motions, shall be filed on or before **February 20, 1998**. Any pretrial motions, filed after the above

date, may be subject to summary denial in the discretion of the Court.

SETTLEMENT CONFERENCE

A settlement conference is not set at this time.

SUBMITTED BY:

/s/ Michael L. Stout
Michael L. Stout
Stout & Winterbottom
215 W. Sixth Street
Roswell, NM 88201

and

William S. Dixon
Rodey, Dickason, Sloan, Akin & Robb, P.A.
P.O. Box 1888
Albuquerque, NM 87103

Attorneys for Plaintiffs

APPROVED:

Telephonic Approval – 10/13/97
Paula I. Forney
Risk Management Division
Legal Bureau
P.O. Drawer 26110
Santa Fe, NM 87502
Attorney for Defendants Gonzales and Robbins

Telephonic Approval – 10/13/97
Timothy V. Flynn-O'Brien
Bryan & Flynn-O'Brien
First Floor Copper Square
500 Copper NW
Albuquerque, NM 87102
Attorney for Defendants Doran and Medina

APPROVAL
RECOMMENDED:

/s/ Joe H. Galvan
JOE H. GALVAN
UNITED STATES
MAGISTRATE JUDGE

APPROVED AND
ADOPTED AS THE
ORDER OF THE COURT:

/s/ Bruce D. Black
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CHARLES C. CURRIER, as personal representative of the Estate of Anthony Michael Juarez deceased; DEVONNE ESPERANZA JUAREZ, as mother and next friend of Latasha Juarez, a minor,	Nos. 99-2287 99-2288
Plaintiffs-Appellees,	
v.	
TOM DORAN, SHIRLEY MEDINA, MELBA GONZALES and REGINA SENTELL in their personal capacities,	
Defendants-Appellants.	
and	
KELLY ROBBINS, in her personal capacity,	
Defendant.	

ORDER

Filed June 1, 2001

Before **SEYMOUR** and **MURPHY**, Circuit Judges, and **KANE***, District Judge.

---

* Honorable John L. Kane, Jr., Senior District Judge, United States District Court for the District of Colorado, sitting by designation.

Appellants Tom Doran, Shirley Medina, Melba Gonzales, and Regina Sentell's petition for rehearing is denied.

Appellants' petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied. In this regard, the court notes that Appellants conceded to the district court, for purposes of the order being appealed, that the October 19, 1993 date was when legal custody transferred to the father. *See* Appellant's Appendix, Volume II, page 397.

Appellees Charles C. Currier and Devonne Esperanza Juarez's petition for rehearing is denied.

Appellees' petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Appellees' Motion to Strike United States' Amicus Curiae Brief is denied as moot.

Entered for the Court

PATRICK FISHER, Clerk of Court

by /s/ Audrey F. Weigel
Deputy Clerk

IN THE CHILDREN'S COURT
STATE OF NEW MEXICO

Case No. CHSQ-9322

In the Matter Of:
ANTHONY JUAREZ

TRANSCRIPT OF PROCEEDINGS

REVIEW/CUSTODY HEARING

August 24, 1993

[2] TAPE SQ-10-TS

THE COURT: . . . in the Matter of Latasha, Anthony and Jacob Juarez, CHSQ-9322. All right, if counsel would announce their appearances, please.

MS. LYMAN: Gene Lyman for the State of New Mexico.

MS. BEYER: Marci Beyer, Guardian Ad Litem.

MR. MICHAELSOHN: Larry Michaelson for Mr. Vargas, an interested party.

MR. CLOUTIER: Andrew Cloutier for Devonne Juarez, Your Honor.

THE COURT: Thank you. And [inaudible] at this time.

MS. LYMAN: Your Honor, I don't – actually it's a review hearing. It could also be, I suppose, a temporary custody hearing, although the way the rule reads, I only have to provide one of those. But we just got Ms. Juarez served.

MR. CLOUTIER: We stipulated to the temporary custody. I suppose you have to have it . . .

MS. LYMAN: Yeah.

MR. CLOUTIER: . . . but – and we stipulated that there was [inaudible].

THE COURT: Okay, so this is a review. What are the present placement arrangements for these children?

MS. LYMAN: Now two of the children, the two older children, are with their father, who is an interested party, [3] and that would be Latasha and Anthony, are with Christopher Vargas. He has physical and legal custody of those two. And I understand from Mr. Cloutier that there are some problems with visitation at this point.

MR. MICHAELSOHN: And, Your Honor, I spoke with my client, and as to both visitation, supervised visitation for the mom or unsupervised visitation for the grandparents or whatever, it's whatever the Department wants at this point. And at some point, I suppose the Court would want to send the matter to mediation if [inaudible] dismissal, but up until the time of the dismissal, it's up to the Department. And I have advised my client to cooperate with whatever the Department feels is appropriate. And as I said, at the time when the Department wants to get out of the case, we'll – I would suggest that be referred to the mediation for permanent status.

I would raise one other question, now that service has been had upon the mom, my client has both children, my client works, has not received any AFDC. I think it would be appropriate to set child support, to have some support coming to my client from the mother.

MS. LYMAN: I believe she has a job, so I would assume she should fill out a Schedule A and we'll see.

MR. CLOUTIER: She's making minimum wage, Your Honor. I don't represent her. What is the consensus here on the

* * *

FIFTH JUDICIAL DISTRICT
CHILDREN'S COURT DIVISION

COUNTY OF CHAVES
STATE OF NEW MEXICO

STATE OF NEW MEXICO, ex rel
CHILDREN, YOUTH AND
FAMILIES DEPARTMENT

IN THE MATTER OF:

JACOB, LATASHA and
ANTHONY JUAREZ,
Children.

CH-SQ-93-22

and concerning:

DEVONNE ESPERANZA JUAREZ,
Respondent.
CHRISTOPHER VARGAS,
Interested Party.

STIPULATED JUDGMENT AND DISPOSITION

(Filed Nov. 10, 1993)

THIS MATTER having come before the Honorable Alvin F. Jones, District Judge, Children's Court Division, for an adjudicatory Hearing On October 19, 1993; Petitioner appearing by Robert Hedrick, Children's Court Attorney; the children appearing by Marci Beyer, Guardian Ad Litem; the Respondent Devonne Esperanza Juarez being represented by Andrew Cloutier, attorney at law; Interested Party, Christopher Vargas being represented by Lawrence Michelsohn, attorney at law; and the parties having stipulated and the Court being fully advised in the premises FINDS:

1. The Court has jurisdiction over the subject matter and the parties herein.

2. Respondent Devonne Esperanza Juarez has entered a plea of no contest with respect to the allegations of the Petition.

3. Pursuant to SCRA 1986 Rule 10-307(C), the Court has determined that:

a. Respondent understands the allegations of the Petition.

b. Respondent understands the possible disposition the Court may make if the allegations of the Petition are found to be true.

c. Respondent understands that she may have the right to deny the allegations of the Petition and to have a trial on the allegations.

d. Respondent understands that by making the foregoing plea of no contest that she is waiving her right to trial.

e. The foregoing plea of no contest is voluntary, not the result of force, threats or promises, and has been made after consultation with and advice of counsel.

f. This stipulations [sic] is not made for the purpose of a consent decree.

4. The child herein is a neglected child as defined in the Children's Code.

5. It is in the best interest of the child that he be placed in the legal custody of the Department for up to two years subject to review on November 16, 1993 at 9:00 a.m.

6. Pursuant to Section 32-4-20, NMSA 1978, as amended, the Court adopts as further findings the Findings of Fact proposed by Petitioner, which are attached hereto as Exhibit A and incorporated herin [sic] by reference.

7. Petitioner has utilized reasonable efforts to prevent the removal of the child from the home and Petitioner continues to utilize reasonable efforts in the reunification of the child with the Respondent.

8. Petitioner has completed a Predispositional Study and proposed a treatment plan, attached hereto as Exhibits B and C and incorporated herein by reference.

9. Devonne Esperanza Juarez and Christopher Vargas have submitted to mediation by Robert Dixon regarding visitation of Latasha and Anthony Juarez. The results of that mediation are attached hereto as Exhibit D and incorporated herein by reference.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. The child shall remain in the legal custody of the New Mexico Children, Youth and Families Department for up to two years subject to review on November 16, 1993 at 9:00 a.m.

2. The proposed treatment plan shall be implemented by the Petitioner with the participation of the Respondent Devonne Juarez.

3. Legal custody of Latasha and Anthony Juarez has been granted to Christopher Vargas by this Court on June 21, 1993. Visitation regarding those two children shall be regulated by the mediated agreement attached as Exhibit

D. Christopher Vargas is hereby dismissed as an Interested Party.

/S/ Alvin F. Jones
ALVIN F. JONES
DISTRICT JUDGE
Children's Court Division

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ENDORSED COPY:
ORG. FILED DIST. COURT

MAY 10 1993

BEE J. CLEM, CLERK

Fifth JUDICIAL DISTRICT
CHILDREN'S COURT DIVISION
COUNTY OF Roosevelt
STATE OF NEW MEXICO

NO. CV-5093-22

STATE OF NEW MEXICO, ex rel
HUMAN SERVICES DEPARTMENT
IN THE MATTER OF: Nicholas Anthony,
[illegible] Gladys
CHILD(REN), AND CONCERNING
[illegible] Christopher Vargas
RESPONDENT(S).

CUSTODY HEARING ORDER

This matter coming on for hearing this 10th day of May, 19 93, to determine if the above-named child(ren) should remain in the custody of the New Mexico Human Services Department pending adjudication of this matter; the State appearing by James A. Kenemer Children's Court Attorney; the child(ren) appearing by S.C. Lopez guardian ad litem: and the respondent(s)

X Christopher Vargas having appeared personally with [illegible] attorney;

..... having appeared personally without an attorney;

..... not having appeared personally but appearing by....., attorney;

..... not having appeared, but having been duly served or given reasonable notice of this hearing on....., 19.....;

X Dwayne Tharp not having been served and not appearing;

..... not having been served, but a sworn affidavit having been filed that the respondent(s) whereabouts are unknown;

And the Court being fully advised in the premises,

FINDS THAT:

X 1. The Court has jurisdiction over the parties and subject matter.

..... 2. The respondent(s) being advised of the right to counsel wish to have counsel appointed by the Court.

..... 3. The respondent(s) being advised of the right to counsel and the right, if indigent, to have counsel appointed, knowingly and intelligently waive(s) these rights and desire(s) to appear pro se.

X 4. There is probable cause to believe that:

..... the child(ren) is/are suffering from an illness or injury, and no parent, guardian, custodian or other person is providing adequate care for the child(ren).

2629

..... the child(ren) is/are in immediate danger from his/her/their surroundings, and removal from those surroundings is necessary for his/her/their safety or well-being.

..... the child(ren) will be subject to injury by others if not placed in the custody of the Department.

..... the child(ren) has/have been abandoned by his/her/their parent, guardian or custodian.

..X.. no parent, guardian, custodian or other person is able or willing to provide adequate supervision and care for the child(ren).

_____ 5. Continuation in the home would be contrary to the child(ren's) welfare.

_____ Reasonable efforts have been made to prevent removal of the child(ren) from the home and to make it possible for the child(ren) to return home.

_____ Given the circumstances, a lack of preventive efforts was reasonable.

..... 6. The Court retains jurisdiction over the Neglect/Abuse Petition, even though the Court does not find probable cause to transfer custody of the child(ren) to the Human Services Department pending adjudication.

IT IS THEREFORE ORDERED THAT:

..... 1. The custody hearing shall be continued for a reasonable period of time.

..X.. 2. Legal custody of the child(ren) shall be with [illegible] pending adjudication.

..X.. 3. Physical custody of the child(ren) shall be as follows: Patricia and Bobby [illegible] pending adjudication.

..... 4. The respondent(s) shall undergo psychological and/or psychiatric evaluations as recommended by the New Mexico Human Services Department. Written evaluations shall be sent to the attorneys of record.

..... 5. The respondent(s) shall be served with notice of these proceedings by publication.

X 6. [illegible]

X 7. This matter will be reviewed on June 21, 1993 at 4PM.

APPROVED:

[illegible]
CHILDREN'S COURT ATTORNEY

[illegible]
DISTRICT JUDGE

[illegible]
GUARDIAN AD LITEM

[illegible]
RESPONDENT(S)' ATTORNEY/PRO SE
for Chris Vargas.

2630

HSD 301 - Side two

.000137a
Aplt. App.

App. 90

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JUN 23 1993

BEE J. CLEM, CLERK

FIFTH JUDICIAL DISTRICT
CHILDREN'S COURT DIVISION

COUNTY OF CHAVES
STATE OF NEW MEXICO

STATE OF NEW MEXICO, ex rel
CHILDREN, YOUTH AND FAMILIES

IN THE MATTER OF:
Tatia A. Whitney and Trent Tinsley
Child(ren),

and concerning:
Tamara Whitney Tinsley
Christie Vargas,
Respondents.

No. CE-SQ-93-55

REVIEW CUSTODY ORDER

THIS MATTER having come before the Court for Review on June 21, 1993; Petitioner being represented by Jeanne Lahrman, Children's Court Attorney; the child(ren) represented by Bristol & Gomez, Guardian ad Litem;

Respondent(s) Christie Vargas having appeared personally with Jennifer Wentworth attorney;

Respondent(s)_____, having appeared personally with _____, attorney;

Respondent(s)_____, having appeared personally with _____, attorney;

Respondent(s) _____, having appeared personally with _____, attorney;

2619
Exhibit C

And the Court being fully advised in the premises, FINDS:

1. The Court has jurisdiction over the subject matter and parties herein.

2. Respondent(s)_____,are (are not) complying with the treatment plan of the Department.

Respondent _____, is (is not) complying with the treatment plan of the Department.

Respondent _____, is (is not) complying with the treatment plan of the Department.

3. The Department has (has not) made reasonable efforts to implement the Treatment Plan.

4. The Department has (has not) presented a treatment plan and the Court has adopted the following proposals:_____

_____

_____

_____

5. It is in the best interest of the child(ren) that _____ Christian Vargas shall remain in the custody of Dusty and Randall and legal custody of Tristy and Dusty shall attempt to reunify Christian Vargas.

App. 92

2620

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JUL 14 1993

BEE J. CLEM, CLERK

FIFTH JUDICIAL DISTRICT
CHILDREN'S COURT DIVISION

COUNTY OF CHAVES
STATE OF NEW MEXICO

STATE OF NEW MEXICO, ex rel
CHILDREN, YOUTH AND
FAMILIES DEPARTMENT

IN THE MATTER OF:
Latisha Antonio and Jack Jesus CH-SQ-93-22
Child(ren).

and concerning:
Deanna Jesus
_____
_____
Respondents.
Christopher Vargas Interested Party

REVIEW CUSTODY ORDER

THIS MATTER, having come before the Court for Review on July 13, 1993; Petitioner being represented by Jeanne M. Lahrman, Children's Court Attorney; the child(ren being represented by ~~Heidi Boyer~~ Bustos + Howell, Guardian Ad Litem; ~~Respondent(s)~~ Int. Party not Christopher Vargas having appeared ~~personally with~~ but Larry Mitchell attorney at law; Respondent(s) _____, having appeared personally with _____, attorney at law; Respondent(s) _____, having appeared personally with _____, attorney at law; And the Court being fully informed in the premises FINDS:

1. The Court has jurisdiction over the subject matter and parties herein.

2615

2. Respondent(s) _____, are (are not) complying with the treatment plan of the Department.

Respondent _____, is (is not) complying with the treatment plan of the Department.

Respondent _____, is (is not) complying with the treatment plan of the Department.

3. The Department has (has not) made reasonable efforts to implement the Treatment Plan.

4. The Department has (has not) presented a treatment plan and the Court has adopted the following proposals:_____

_____

_____

_____

5. It is in the best interest of the child(ren) that Tasha and Anthony remain in the legal custody of the Department of Protective and Regulatory Services. Tasha shall remain in physical and legal custody of the Department

6. The above-captioned cause is dismissed because:

_____ The intervention of the Department is no longer necessary.

_____ The child(ren) has/have been adopted.

_____ The child _____ has reached the age of majority and the above-captioned cause is dismissed as concerns this child.

2616

7. The next hearing is: August 24, 1993 at 9AM

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Court orders the above.

DISTRICT JUDGE
Children's Court Division

APPROVED:

JEANNE M. LAERMAN
Children's Court Attorney

MARCI BEYER
GUARDIAN AD LITEM

ATTORNEY FOR RESPONDENT

ATTORNEY FOR RESPONDENT

ATTORNEY FOR RESPONDENT

ATTORNEY FOR RESPONDENT

2617

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SEP 23 1993

BEE J. CLEM, CLERK

FIFTH JUDICIAL DISTRICT
CHILDREN'S COURT DIVISION

COUNTY OF CHAVES
STATE OF NEW MEXICO

STATE OF NEW MEXICO, ex rel
CHILDREN, YOUTH AND FAMILIES

IN THE MATTER OF:
Lakeska Anthony + Jacob Jones
Child(ren),

and concerning:
Devonne Deshawnka Jones
Christopher Vargas Interested Party
Respondents.

No. CH-SQ-93-22

REVIEW CUSTODY ORDER

THIS MATTER having come before the Court for Review on September 21, 1993; Petitioner being represented by Jeanne Lahrman, Children's Court Attorney; the child(ren) represented by ~~Bristol & Gomez~~ Marci Beyer, Guardian ad Litem;

Respondent(s) Devonne Jones having appeared personally with Andrew Cloutier, attorney;

~~Respondent(s)~~ Interested Party Christopher Vargas having appeared personally with Lawrence Michelson attorney;

Respondent(s)_____, having appeared personally with _____, attorney;

Respondent(s) _____, having appeared personally with _____, attorney;

2595
Exhibit P

And the Court being fully advised in the premises, FINDS:

1. The Court has jurisdiction over the subject matter and parties herein.

2. Respondent(s)_____,are (are not) complying with the treatment plan of the Department.

Respondent _____, is (is not) complying with the treatment plan of the Department.

Respondent _____, is (is not) complying with the treatment plan of the Department.

3. The Department has (has not) made reasonable efforts to implement the Treatment Plan.

4. The Department has (has not) presented a treatment plan and the Court has adopted the following proposals:_____

_____

_____

_____

5. It is in the best interest of the child(ren) that (1) Dalton and Anthony remain in the custody of Christopher Vargas. (2) Jacob shall remain in the physical and legal custody of the Department. (3) Devon Juarez shall have unsupervised visitation with Jacob Juarez and supervised visitation with Latisha and Anthony.

2596

6. The above-captioned cause is dismissed because:

_____ The intervention of the Department is no longer necessary.

_____ The child(ren) has/have been adopted.

_____ The child _____ has reached the age of majority and the above-captioned cause is dismissed as concerns this child.

_____ _____

7. The next hearing is: Adjudicatory Hearing/Review on October 19, 1993 at 9 AM

IT IS ORDERED, ADJUDGED AND DECREED that the Court orders the above.

DISTRICT JUDGE

Children's Court Division

APPROVED:

CHILDREN YOUTH & FAMILY

2597

.000149

Aplt. App.

BY: Joann M. Kelsey

CHILDREN'S COURT ATTORNEY

ATTORNEY FOR RESPONDENT

Charlotte Vargas

FIFTH JUDICIAL DISTRICT
CHILDREN'S COURT
CHAVES COUNTY, NEW MEXICO

ENDORSED COPY
ORG. FILED DIST. COURT

OCT 18 1993

BEE J. CLEM, CLERK

IN RE: Anthony, Jacob & Katrina Hurtado

CLERK'S RECORD OF PROCEEDINGS

CHIN ☐ DELINQUENT ☐ A & N ☒

☐ PETITION
☐ PETITION TO REVOKE PROBATION

NO. CH-93-32

TYPE HEARING

☐ ARRAIGNMENT
☐ DETENTION
☐ RELEASE
ADJUDICATORY ☐ JURY ☐ NON-JURY
☐ DISPOSITION
☒ OTHER: Adjudicatory

☐ ADMITS _____
☐ DENIES _____
☐ JURY VERDICT
☐ COMMITTED OFFENSE
☐ DID NOT COMMIT OFFENSE
☐ COURT'S FINDINGS
☐ COMMITTED OFFENSE
☐ DID NOT COMMIT OFFENSE
☐ DISMISSED _____

COURT FINDS

☐ WITHIN PURVIEW OF CHILDREN'S CODE
☐ CHILD IN NEED OF SUPERVISION
☐ PROBATION ☐ REVOKED ☐ CONTINUED
☐ ORDER DETAINED IN JUVENILE DETENTION
☐ ORDERED RELEASED TO _____
☐ UNDER SUPERVISION JUVENILE PROBATION DEPARTMENT UNTIL FURTHER ORDER
☐ 90 DAYS DIAGNOSTIC COMMITMENT TO YDDC, ALBUQUERQUE
☐ COUNSELING ASSOCIATES, INC.

☐ DELINQUENT
☐ IN NEED OF CARE & REHABILITATION
☐ COMMITTED TO CHILDREN'S PSYCHIATRIC UNIT N.M. STATE HOSPITAL, LAS VEGAS
☐ COMMITTED TO N.M. SCHOOL FOR:
☐ BOYS AT SPRINGER
☐ GIRLS AT ALBUQUERQUE
UNTIL RELEASED AS PROVIDED BY LAW
☐ SIXTY DAY DEFERRAL
☐ SET ☒ RESET: Yth Review Hearing 01-16-93 @ 9:00 A.M.

OTHER: Mr. Vargas is ordered to attend his legal physical custody of Anthony & Katrina - (consent to Adjudication of Neglect and placed to Treatment Team) (Note: Since Mr. Vargas no longer has to attend hearings.)

JUDGE: ☒ JONES ☐ SCHNEDAR ☐ _____

☐ SPECIAL MASTER _____

Kent Hedrick
(Asst.) District Attorney

☐ DETENTION HEARING OFFICER _____

Beyer/Wicklund/Coutrier
Chic. Vargas & Deyarmond

☒ MONITOR Infanzia

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Supreme Court, U.S.
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No. 01-382

In the Supreme Court of the United States

TOM DORAN and MELBA GONZALES,
Petitioners,

v.

CHARLES C. CURRIER, as personal representative of the Estate of Anthony Michael Juarez, deceased; and DEVONNE ESPERANZA JUAREZ, as mother and next friend of Latasha Juarez, a minor,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether this Court should consider an absolute-immunity issue that was neither decided by, nor explicitly raised in, the district court or the court of appeals.

II. Whether this Court's decision in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), immunizes social workers from constitutional liability for recklessly consigning children to the physical and legal custody of an obviously dangerous parent with whom the children never previously lived.

III. Whether this Court has jurisdiction to review the sufficiency of the evidence concerning the date when the children left the state's legal custody.

IV. Whether public officials who knowingly endanger citizens in ways not expressly explored by due process case law are entitled to qualified immunity.

LIST OF PARTIES

Petitioners

Tom Doran
Melba Gonzales

Respondents

Charles C. Currier, as personal representative of the Estate of Anthony Michael Juarez, deceased

Devonne Esperanza Juarez, as mother and next friend of Latasha Juarez, a minor

Other Parties to the Proceeding in the Tenth Circuit

All parties listed above were likewise parties to the Tenth Circuit appeal. Defendant-Appellant Shirley Medina was an additional party to the appeal, and she is also a Respondent to the conditional Cross-Petition for a Writ of Certiorari in this Court. Defendant-Appellant Regina Sentell was an additional party to the appeal. Defendant Kelly Robbins did not participate in the appeal but remains a party in the district court. The United States of America participated in the Tenth Circuit appeal as an amicus curiae in support of Defendants' petition for rehearing.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Charles C. Currier and Devonne Esperanza Juarez ("Plaintiffs") respectfully file this brief in opposition to the petition for a writ of certiorari.

JURISDICTION

Jurisdiction in the court of appeals existed by virtue of the collateral-order doctrine. Because the question of when the Juarez children left the state's legal custody (the third of Petitioners' "Questions Presented," and point III under "Reasons for Granting the Writ") implicates issues of "evidentiary sufficiency," the court of appeals lacked jurisdiction to consider it, as Plaintiffs will explain below. *See Behrens v. Pelletier*, 516 U.S. 299, 313 (1996); *Johnson v. Jones*, 515 U.S. 304 (1995).

STATEMENT OF THE CASE

A balanced and reasonably thorough statement of the facts appears in the "Facts and Procedural History" section of the court of appeals' opinion, which Plaintiffs incorporate herein by reference. *See* Appendix to the Petition for a Writ of Certiorari at 4-9 [hereinafter App.]. Petitioners truncate their factual summary by lopping off all events that occurred after October 1993, apparently on the theory that public officials are constitutionally free to create and enhance special dangers for children who have left state custody. In fact, between October 1993 and April 1994, Petitioners not only deepened the peril in which they had previously placed Anthony and Latasha Juarez, but repeatedly failed to rescue the children from that peril. *See id.* 6-7; [Plaintiffs'] Conditional Cross-Petition for Writ of Certiorari.

In addition to leaving out much of the relevant story, Petitioners misstate the facts in at least two respects. First, Petitioners assert that the children's court awarded Christopher Vargas physical custody of the children in May 1993 "[b]ased on the recommendation of social worker Medina." Petition for a Writ of Certiorari at 3 [hereinafter Petition]; *accord id.* at 14. Although Plaintiffs initially alleged that Medina's recommendation had led to the transfer of custody — and although the opinion of the court of appeals recited the original allegation, *see* App. 5 — Petitioners themselves demonstrated that Petitioner Doran, not Medina, bore responsibility for the change of custody, and Plaintiffs adopted that version of the facts in opposing Petitioners' request for qualified immunity. *See* 10th Cir. Aplt. App. at 153c, 155-56, 209. Thus, there is no substance to the contention that Vargas's acquisition of custody was a fait accompli before Petitioner Doran became involved. *See* Petition at 12, 14-16.

Second, Petitioners repeatedly refer to the "return" of physical and legal custody to Vargas. *See* Petition at 6-7. In fact, the children had never lived with Vargas before Petitioners placed them in that position. The present lawsuit is therefore quite different from *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), as the court of appeals explained at some length. *See* App. 23-27.

REASONS FOR DENYING THE WRIT

Petitioners offer up a mèlange of arguments in the evident hope that the Court will find something about the smorgasbord appetizing. But at least one of the proffered issues was never raised or decided below, and another lies beyond the reach of appellate jurisdiction. None of the

questions presented are worthy of the Court's attention.

I. Neither in the District Court nor in the Court of Appeals Did Petitioners Seek Absolute Immunity, nor Have They Ever Been Entitled to It.

Petitioners have begun their campaign for absolute immunity in this Court. In the district court they sought qualified immunity alone. *See* 10th Cir. Aplt. App. at 116, 307, 392. In the court of appeals, Petitioner Doran devoted a few pages of his opening brief to the citation of absolute-immunity precedents in support of his request for qualified immunity, *see* Appellants Tom Doran, Shirley Medina and Regina Sentell's Brief-in-Chief at 35-38, and Plaintiffs briefly addressed the argument in that context. But Doran's reply brief dropped the argument altogether, and once again focused exclusively on qualified immunity. *See, e.g.*, Appellants Doran, Medina and Sentell's Reply Brief at 26. Not surprisingly, the court of appeals adopted the same focus. Because this Court does not sit as a forum of first resort, it should decline to entertain the debut of Petitioners' bid for absolute immunity. *See, e.g.*, *Glover v. United States*, 121 S. Ct. 696, 701 (2001).

But even if the claim of absolute immunity had been properly raised and rejected below, this case would present no circuit conflict for the Court to untangle. If "social workers ... involved in civil family welfare proceedings[] can ever function as prosecutors for purposes of § 1983 immunity analysis," *Hoffman v. Harris*, 511 U.S. 1060, 1063 (1994) (Thomas, J., dissenting from denial of certiorari), the social workers in this case did not. Courts have cautioned that "absolute immunity is not appropriate [when] ... child welfare workers normally are to report findings of neglect or abuse,

even those which might indicate a need for immediate intervention, to other authorities for ... advocacy in the form of initiation of court proceedings." *Snell v. Tunnell*, 920 F.2d 673, 690 (10th Cir. 1990). For instance, in *Miller v. City of Philadelphia*, 174 F.3d 368 (3d Cir. 1999), the Third Circuit distinguished its earlier decision in *Ernst v. Child & Youth Services*, 108 F.3d 486 (3d Cir. 1997) — on which Petitioners prominently rely, *see* Petition at 8 n.1, 10 — and refused to accord absolute immunity to a social worker who had merely transmitted information to a children's court attorney, because the attorney was ultimately responsible for presenting evidence and recommendations to the court. 174 F.3d at 376 n.6; *accord, e.g.*, *Williams v. Hauser*, 948 F. Supp. 164, 166 (D. Conn. 1996).

A similar division of labor prevails in the children's courts of New Mexico. "In cases involving civil abuse or civil neglect ..., the attorney selected by and representing the [human services] department is the children's court attorney." N.M. Stat. Ann. § 32A-1-6(C) (1999). That attorney is charged with deciding whether to seek the court's assistance in cases of suspected abuse or neglect. *See id.* § 32A-4-15. Indeed, in the court of appeals, Petitioners persistently sought to defend their conduct on the ground that it was the children's court attorney who had possessed and exercised the determinative discretion not to proceed with a custody petition. *See, e.g.*, Appellants Tom Doran, Shirley Medina and Regina Sentell's Brief-in-Chief at 13, 37; Appellant Melba Gonzales' Brief-in-Chief at 6-7, 14, 26, 28, 44-45. As social workers who supplied the attorney with information — or who failed to do so — Petitioners were no more entitled to share in the attorney's immunity (whatever the scope of that immunity might have been) than is a complaining witness who induces a prosecutor to indict, *see Malley v. Briggs*, 475 U.S. 335, 339-43 (1986).

Moreover, in each precedent cited by Petitioners, absolute prosecutorial immunity is justified by the "serious danger that the decision to [initiate prosecution] will provoke a retaliatory response." *Butz v. Economou*, 438 U.S. 478, 515 (1978). Each one revolves around an allegation that a prosecutor's malice, or a social worker's excessive zeal, led to an unjust conviction or some other unwarranted exercise of the state's coercive power. This case is significantly different. Although Plaintiffs' complaint alleges in the alternative that the children's court issued custody orders on Petitioner Doran's "recommendation," an important aspect of the claim is that Doran remained *silent* about crucial information whose revelation might have saved the children from private violence, even to the point of failing to attend the hearing at which the court awarded legal custody to Vargas. *See* App. 5, 28.[1] In the cases cited by Petitioners, the rationale for absolute immunity is that "those involved in judicial proceedings should be given every encouragement to make a full disclosure of all pertinent information within their knowledge." *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983) (internal quotation marks omitted). More particularly, while "we want our child welfare workers to exercise care in deciding to interfere in parent-child relationships," "we do not want them to be so overly cautious ... that they fail to intervene in situations in which children are in danger."

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[1] This is not to suggest that the only claims against Petitioners concern communications, or failures to communicate, with the children's court. On the contrary, the allegations range far beyond the judicial process. *See, e.g.*, App. 7. Social workers enjoy absolute immunity, if at all, "only when they are acting in their capacity as *legal advocates* — initiating court actions or testifying under oath — not when they are performing administrative, investigative, or other functions." *Holloway v. Brush*, 220 F.3d 767, 775 (6th Cir. 2000) (en banc).

Ernst v. Child & Youth Servs., 108 F.3d at 496; *see also Millspaugh v. County Dep't of Pub. Welfare*, 937 F.2d 1172, 1177 (7th Cir. 1991) (absolute immunity accorded to social workers seeking removal of children from parents' custody "induces the parties to present all arguments to [the children's court]"), *cited in* Petition at 9 n.1. In this case, the same rationale favors liability, not immunity. *Cf. also Briscoe*, 460 U.S. at 339-40 (distinguishing between "pro-defendant" and "pro-prosecution" perjury, and suggesting that civil rights laws might provide a remedy for "perjury resulting in unjust *acquittals*," which had "the effect of preventing effective enforcement of the laws"); *Holloway v. Brush*, 220 F.3d 767, 777 (6th Cir. 2000) (en banc) ("A jury could reasonably find that [the defendant social worker] appropriated the entire judicial process to herself by ... feeding [the court] inaccurate information by ... omission ....").

To Plaintiffs' knowledge, no federal court has granted absolute immunity to social workers whose interactions with the judicial system have amounted to complicity in child abuse. Hence in *Camp v. Gregory*, 67 F.3d 1286 (7th Cir. 1995), the court found it "significant" that a social worker "allegedly misrepresented to the [children's] court that all was well," thereby "effectively prevent[ing] any independent assessment by that court." *Id.* at 1296. And in *Chrissy F. v. Mississippi Department of Public Welfare*, 925 F.2d 844 (5th Cir. 1991), the court explicitly denied absolute immunity to an actual *prosecutor* who had failed "to comply with his obligation to report allegations of abuse to the Youth Court." *Id.* at 849-51; *see also id.* at 849-52 (denying immunity to social worker who "knowing[ly] prepar[ed] for [a] Youth Court hearing ... a report that omitted all references to plausible evidence of abuse" of plaintiff by her natural father).

In short, even if Petitioners had made their demand for absolute immunity in the lower courts — and even if it had survived the "necessary historical inquiry" into "whether social workers enjoyed absolute immunity for their official duties in 1871," *Hoffman v. Harris*, 511 U.S. at 1062 (Thomas, J., dissenting from denial of certiorari) — Petitioners could not have shown that this lawsuit targets their performance of prosecutorial functions or otherwise subverts the judicial process. They are left with the argument that cloaking social workers with absolute immunity would be a good idea. *See* Petition at 11. But "[t]he federal courts 'do not have a license to establish immunities from § 1983 actions in the interests of what [they] judge to be sound public policy.'" *Hoffman*, 511 U.S. at 1063 (Thomas, J., dissenting from denial of certiorari) (quoting *Tower v. Glover*, 467 U.S. 914, 922-23 (1984)).

II. The Fact-Dependent Ruling That Plaintiffs Have Adequately Alleged Petitioners' Unconstitutional Endangerment of the Children Does Not Warrant This Court's Review.

Petitioners filed their qualified-immunity motions at a time when discovery had been confined by court order to a single narrow issue — namely, the date when the state had ceded legal custody of the children to their father, Christopher Vargas. *See* App. 5, 8, 75-79. Because the motions went well beyond the particular *DeShaney* argument that such limited discovery was designed to illuminate, *see id.* 60, the district court treated them as motions to dismiss. Thus, the question facing the district court and the court of appeals was whether "it appear[ed] beyond doubt that [Plaintiffs could] prove no set of facts in support of [their] claim which would entitle [them] to relief." *Id.* 22 (quoting *Conley v. Gibson*,

355 U.S. 41, 45-46 (1957)). More specifically, under *Siegert v. Gilley*, 500 U.S. 226 (1991), the initial question was whether Petitioners' alleged conduct between May 1993 and April 1994 *could have* constituted a violation of the children's civil rights — "depending, of course, on further context as provided by discovery," App. 31.

Petitioners purport to subdivide this fact-bound inquiry into four additional questions, *see* Petition at 12 — the answers to which will supposedly settle for all time "the degree to which, or manner in which, [a] state actor must be involved in creating [a] danger for [substantive due process] liability to exist, [and] how immediate the danger must be in order for the doctrine to apply," *id.* at 13-14. Precisely what Petitioners want this Court to decide (beyond reversing the judgment below) is unclear. What is clear is that none of it amounts to a concrete and substantial issue deserving of High Court review.

A. This case does not present the principal question Petitioners seek to argue.

The second of Petitioners' "Questions Presented" is whether the danger-creation doctrine contemplates constitutional liability when social workers "caus[e a] court to award legal custody to [a] natural father of children already in [the] father's physical custody." Petition at 11 (capital letters omitted); *see id.* at i. But as Plaintiffs have explained, *see supra* p. 2, the children were not "already" in their father's physical custody when Petitioners first encountered them. Petitioner Doran helped put them there, in the face of information that should have given him pause. *See, e.g.*, App. 4-5. Far from merely "be[ing] aware of the dangers that [the children] faced in the free world," Petitioners

"played [a] part in their creation." *DeShaney*, 489 U.S. at 201.[2]

B. Even on the facts hypothesized by Petitioners, the decision below would not conflict with *DeShaney*.

Petitioners insist that if they merely caused the state to surrender legal custody of children who were already in a natural parent's physical custody, this lawsuit "is indistinguishable from *DeShaney*." Petition at 15. Not so. The plaintiffs in *DeShaney* "concede[d] the State played no part in creating [the danger]." 489 U.S. at 197. Plaintiffs in this case make no such concession. By taking affirmative steps to remove state oversight of the children's home life — despite worrisome evidence that the children were being physically abused — Petitioners "interfere[d] with the

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[2] Citing *State v. Sanders*, 628 P.2d 1134 (N.M. Ct. App. 1981), Petitioners argue that a biological parent has an immediate and inalienable right to the custody of his children — no matter how long he has ignored that right — and that, consequently, Petitioners' delivery of the children to the custody of their father accomplished nothing more than the outcome that otherwise would have obtained under state law. *See* Petition at 15. *Sanders* fails to support the notion that an absentee parent can suddenly assume control over the lives of his children and spirit them away from the home of their sole caregiver whenever it suits him. But even if the case supported that proposition, it would not help Petitioners. Custodial rights exist only to the extent that they have not "been terminated, however temporarily, by appropriate authority." *Sanders*, 628 P.2d at 1137. By the time Petitioner Doran acted to turn the children over to their father, they were firmly ensconced in state custody.

protective services which would have otherwise been available in the community," *Freeman v. Ferguson*, 911 F.2d 52, 54 (8th Cir. 1990), and "frustrate[d] the efforts of other private persons and public officials to improve [the children's] situation," *Camp v. Gregory*, 67 F.3d at 1296.

Nor do Plaintiffs seek to hold Petitioners accountable for "passive conduct" or a "mere failure to protect." Petition at 21. The Juarez children were in the state's protective custody — not in a state of nature — when Petitioners first intervened in their lives. The state's custody did not lapse through inaction, but ended as a result of Petitioners' recommendations (as well as their concealment of material information from the children's court). Thus, this case presents "a relatively straightforward application of the [danger creation] doctrine." App. 41. It represents no departure from *DeShaney*, and it creates no serious dissonance among the decisions of the circuits.[3]

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[3] Petitioners contend that the decision specifically clashes with two Eleventh Circuit cases supposedly holding "that danger is not created when a child in the physical custody of a parent or relative is injured by that person, even if the state has legal custody." Petition at 19; *accord id.* at 29-30. Even if conflict with the decisions of a single circuit were significant, both cases are distinguishable. In *Wooten v. Campbell*, 49 F.3d 696 (11th Cir. 1995), the state restored physical custody to the parent who had originally enjoyed it. *See id.* at 698. In *Powell v. Georgia Department of Human Resources*, 114 F.3d 1074 (11th Cir. 1997), the state likewise effectuated the "return" of a child to a natural parent, *see id.* at 1078, 1080, and never assumed custody of the child in any meaningful sense, *see, e.g., id.* at 1080. Here, by contrast, Anthony and Latasha Juarez were in their mother's custody until the state took them away. Absent the state's intervention, their father would never have gotten his hands on

C. Consistently with circuit precedent, Plaintiffs have alleged an immediate threat of harm.

Petitioners argue that the court of appeals has staked out a uniquely lenient position on proximate cause in § 1983 cases, because "[e]ven assuming legal custody was not transferred until October 1993, the injury occurred in April 1994, six months later." Petition at 22. While it is true that Anthony was not doused with boiling water, and Latasha's whole-body bruising was not discovered, until six months after the custody change, Plaintiffs have alleged that the children were beaten continuously in the interim. *See* App. 6-7; 10th Cir. Aplt. App. at 70-71. In any event, all that the case law on state-created danger requires is the conscious disregard of a *risk* of immediate harm. *See* Petition at 22 (citing *Armijo v. Wagon Mound Pub. Sch.*, 159 F.3d 1253, 1262 (10th Cir. 1998)). Whether the risk immediately materializes is beside the point.

The cases cited by Petitioners are not to the contrary. In *Martinez v. California*, 444 U.S. 277 (1980), this Court held that murder was "too remote a consequence" of a parole board's decision, not merely because five months elapsed between the state's act and the parolee's, but also because "the parole board was not aware that appellants' decedent, as distinguished from the public at large, faced any special danger." *Id.* at 285. Thus, in *Reed v. Gardner*, 986 F.2d 1122 (7th Cir. 1993), the court decided that police officers could be held liable for endangering the traveling public as a whole, as long as "the immediate threat of harm ha[d] a

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them.

limited range and duration." *Id.* at 1127. By contrast, Petitioners in the present case knew that Anthony and Latasha "were members of a limited and specifically definable group," App. 30 (internal quotation marks omitted) — the only two people in the world whose safety in the home of Christopher Vargas was at issue. There was nothing "too remote" about the injuries they ultimately suffered at his hands. *See also L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992) (apparently having nothing to say on the topic of "close temporal proximity"), *mis-cited in* Petition at 22.

III. The Question Whether the Juarez Children Remained in the State's Legal Custody Between June and October 1993, Whatever Its Implications for the Development of American Constitutional Law, Is Not Properly Before This Court.

Petitioners complain that the district court and the court of appeals both refused to "determine that, based on orders entered by the New Mexico children's court and transcripts of hearings, legal custody transferred to [the children's father] in June, 1993," Petition at 24; and they even undertake to furnish this Court with some of the evidence that the Court might find useful in formulating its own findings on the subject, *see* App. 82-99. They explain that the date of the custody change is "critical to [their] ... defense." Petition at 23. They do not explain why that date — or the lower courts' alleged error in failing to determine it — should matter to anyone else.

But even if the issue's significance transcended the present case, this Court would have no occasion to consider it. In the first place, as the court of appeals pointed out in denying Petitioners' request for a rehearing, Petitioners

"conceded to the district court, for purposes of the order being appealed, that the October 19, 1993 date was when legal custody transferred to the father." App. 81. Try as Petitioners might, *see* Petition at 24 n.5, they cannot turn back the clock on that concession.

Under the collateral-order doctrine, moreover, the district court's denial of qualified immunity was appealable only to the extent that the appeal presented "neat abstract issues of law." *Johnson v. Jones*, 515 U.S. at 317 (internal quotation marks omitted). "[T]he appealable issue [was] ... whether the facts alleged ... support[ed] a claim of violation of clearly established law." *Mitchell v. Forsyth*, 472 U.S. 511, 528 n.9 (1985). Whether the facts alleged were adequately supported by the evidence — whether, in other words, "[the] record demonstrate[d] a 'genuine' issue of fact for trial," *Johnson v. Jones*, 515 U.S. at 316 — was a question on which the appellate court had no power to pass. The court of appeals lacked jurisdiction over such questions even though the failure to make a sufficient factual showing in response to a motion for summary judgment ought to result in judgment "as a matter of law." Fed. R. Civ. P. 56(c).

Plaintiffs have alleged — on the basis of a children's court order of July 14, 1993, *see* App. 93-95, as well as other orders, transcripts, rules of procedure, contemporaneous accounts of interested observers, and the surrounding circumstances, *see, e.g.*, 10th Cir. Aplt. App. at 137a, 141, 149-51, 188-89, 244, 249, 251 — that the Juarez children remained in the state's legal custody until October 19, 1993. Whether in fact they did, notwithstanding a June 1993 order implying otherwise, is by no means a "neat abstract issue[] of law." *Johnson v. Jones*, 515 U.S. at 317. Indeed, it is not an issue of law at all — except insofar as the district court may eventually be required to resolve it in *Plaintiffs'* favor, under

"the rule that when there are two conflicting judgments rendered by a court upon the same rights of the same parties that which is later in time prevails." *Nichols v. Nichols*, 648 P.2d 780, 784-85 (N.M. 1982). Whatever the power of a federal "enforcing court" to interpret an ambiguous consent decree entered in federal litigation, *see EEOC v. Safeway Stores, Inc.*, 611 F.2d 795, 798 (10th Cir. 1979), *cited in* Petition at 25, "[w]hat has been adjudicated in a prior suit [in New Mexico] is often a question of fact, which ... has to be subjected to parol evidence and referred to a jury." *Lemon v. Morrison-Knudsen Co.*, 277 P.2d 542, 546 (N.M. 1954) (internal quotation marks omitted).

Considering the "conflicting evidence" about the date when the state relinquished legal custody, App. 28 n.6, the district court found the issue to be "hotly dispute[d]," *id.* 59. The court assumed the truth of Plaintiffs' allegation that the state's legal custody persisted until October 19, 1993, because it deemed the issue both factual and "genuine." Fed. R. Civ. P. 56(c). Even if that conclusion were dead wrong, it would be unreviewable here. Even if the district court had failed to "exercise its discretion in a way that protect[ed] the substance of the qualified immunity defense," *Crawford-El v. Britton*, 523 U.S. 574, 597 (1998), *cited in* Petition at 23, 26, no appeal from that misstep would lie. *See, e.g.*, *id.* at 595 (Court has "declined to craft an exception to settled rules of interlocutory appellate jurisdiction and rejected the argument that the policies behind the immunity defense justify interlocutory appeals on questions of evidentiary sufficiency"); *Johnson v. Jones*, 515 U.S. at 316-18 (appellate courts reviewing denials of qualified immunity cannot entertain "questions about whether or not a record demonstrates a 'genuine' issue of fact for trial," even though avoidance of such questions may "undercut the very policy (protecting public officials from lawsuits) that ... militates in

favor of immediate appeals").

Petitioners' fallback theory — that "[i]f the children's court orders are ambiguous ..., then [Petitioners] are entitled to qualified immunity based on their objectively reasonable assumption that their department did not have legal or physical custody after June, 1993," Petition at 25 — fares no better. In the first place, Petitioners never made this argument to the district court. *See, e.g.*, 10th Cir. Aplt. App. at 397; *cf. Behrens v. Pelletier*, 516 U.S. at 313 ("Th[e] argument [that defendant's conduct was 'objectively legally reasonable'] was presented by petitioner in the trial court, and there is no apparent impediment to its being raised on appeal."). And in any event, the question here is not simply whether a given court order was "ambiguous," but whether it accurately reflected an ongoing series of judicial and administrative events in which Petitioners themselves were intimately involved. Did Petitioners actually and reasonably believe that a court order describing a disposition that never crossed the judge's lips at a hearing Petitioners attended — an order entered in violation of Petitioners' own rules of procedure, and contradicted by a second order from the same court a month later — released them from any constitutional responsibility for the Juarez children's safety? The district court would have been hard-pressed to decide these questions even if Plaintiffs had been permitted to conduct meaningful discovery on the subject, *see* App. 9-10. Certainly this Court cannot resolve them in the first instance.

IV. The Relevant Law Was Clearly Established.

Petitioners finally decry the court of appeals' determination that the constitutional rights at issue were clearly established. They declare that "the court cited no cases before 1993 distinguishing *DeShaney*'s ruling that return

of a child to a parent is not a civil rights violation," Petition at 29; but given that *this* case did not involve the "return of a child to a parent," *see supra* p. 2, it is unclear why Petitioners believe that the court of appeals was obligated to locate precedents somehow avoiding the effect of *DeShaney*. Petitioners assert that "the only similar case held that a failure to prevent harm did not constitute a substantive due process violation," Petition at 29; but again, because Petitioners are guilty of much more than a "failure to prevent harm," *see supra* pt. II(B), the significance of this observation is obscure.

Petitioners' criticism of the court of appeals' decision ultimately rests on the argument that

> [t]here are no prior cases cited by the [c]ourt ... which involved facts comparable to those at issue in this case, namely, the application of the state created danger doctrine to a social worker and his supervisor where the social worker recommended continuation of custody of minor children with their father despite bruises on the children and abuse allegations by their mother during the children's stay with their father.

Petition at 29. Though Plaintiffs reject the characterization of Petitioners' conduct as mere advocacy of the status quo, they will concede the crux of the argument: there has never been a reported case exactly like this one. But that, of course, is not the test of constitutional liability. Petitioners need not show that the fate met by the Juarez children was the second coming of an earlier catastrophe. That the governing principles must be "clearly established" does not mean "that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful."

Anderson v. Creighton, 483 U.S. 635, 640 (1987).

Plaintiffs will not pretend that the sense in which the law must be clearly established in "danger creation" cases is either uncontroversial or unimportant. *See* [Plaintiffs'] Conditional Cross-Petition for Writ of Certiorari. But this is not a case on the margins. Anthony and Latasha Juarez were in the protective custody of the state. Petitioners had "a responsibility to oversee and supervise the[ir] safety and well-being." *Perkins v. Dep't of Human Servs.*, 748 P.2d 24, 29 (N.M. Ct. App. 1987). Ignoring explicit allegations of abuse and brushing aside the evidence of it, Petitioners cut off the children's access to "the protective services which would have otherwise been available in the community." *Freeman v. Ferguson*, 911 F.2d at 54. It simply cannot be said — on the face of Plaintiffs' pleadings, and "as a matter of law" — that these actions were "objectively legally reasonable." *Anderson v. Creighton*, 483 U.S. at 641.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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